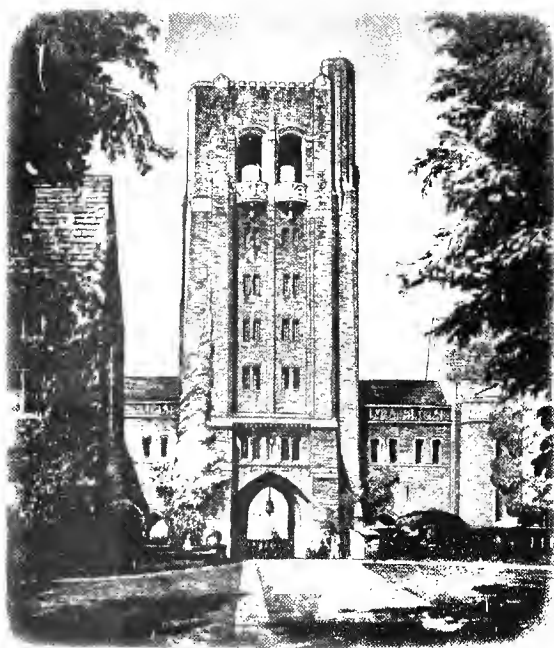




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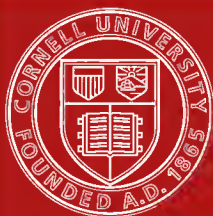
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ILLUSTRATIVE CASES

IN

AGENCY

WITH ANALYSIS AND CITATIONS.

BY

JAMES PAIGE, LL. M.,

PROFESSOR OF LAW IN THE COLLEGE OF LAW, UNIVERSITY OF MINNESOTA.

PHILADELPHIA:
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PREFACE.

THIS collection of "Cases" in Agency has been prepared by Mr. Paige, lecturer upon that subject in our Law School, and differs little from other books in the series. The legal proposition at the head of the case is placed in black-faced type, thus emphasizing it, and at the same time improving the appearance of the page. This is an improvement, we think, as one of the objects in preparing cases at all is to aid the student in procuring a distinct idea of the first principles of primary law. Experience confirms us in the belief that *acquisition* and *application* of primary law are greatly assisted by a combination of propositions and cases.

W. S. PATTEE, LL. D.,
Dean of the College of Law.

UNIVERSITY OF MINNESOTA,
MINNEAPOLIS, MINN., FEB. 1, 1895.

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ILLUSTRATIVE CASES

IN

AGENCY.

I

OF THE NATURE AND FORMATION OF THE RELATION.

A

DEFINITIONS.

Agency is a legal relation, founded upon the express or implied contract of the parties or created by law, by virtue of which one party, the agent, is employed and authorized to represent and act for the other, the principal, in business dealings with third persons.¹

The *principal* is the person from whom the authority is derived.²

An *agent* is a person duly authorized to act on behalf of another, or one whose unauthorized act has been duly ratified.³

Authority or *power* is the right arising out of the contract of agency whereby an agent has the capacity to act on behalf of another.⁴

Authority may be conferred by an express, implied, oral, or written contract. If conferred by an instrument under seal the instrument is termed a letter or *power of attorney*.⁵

¹ Co. Litt. 270; Ewell's Evans on Agency, 1; Mechem on Agency, 1.

² Mechem, § 1.

³ Co. Litt. 207; Ewell's Evans, 1.

⁴ Ewell's Evans, 2.

⁵ Story, § 57; Mechem, 273, 274; Ewell's Evans, 16.

B

WHO CAN AND WHO CANNOT BE PRINCIPALS.

1

IN GENERAL.

Any person having legal and natural capacity to act can act through an agent.

Coombe's Case, 9 Co. Rep. 135; *Lyon v. Kent*, 45 Ala. 656; *Lea v. Bringier*, 19 La. An. 197; Bishop on Contracts, 1026, 1122; Story on Agency, 5, 6; Mechem on Agency, 43; Wharton on Agency, 9.

2

INFANTS.

Infants, not having legal capacity to contract, cannot be principals.

ARMITAGE *v.* WIDOE.

Supreme Court of Michigan, 1877.

36 Mich. 124.

COOLEY, C. J. This action is brought to recover back \$400 paid in the plaintiff's name on a contract for the purchase of lands. The contract was entered into April 24, 1875, and purports to be between Jesse C. Widoe as vendor and Henry Armitage as vendee. The purchase price was \$13,000, of which \$3,000 was payable on or before May 10, 1875, and the balance in ten annual installments of \$1,000 each, with annual interest. Henry Armitage was about seventeen years of age at the date of the contract, and his name was signed to it by William H. Armitage, his father. The plaintiff, by his own evidence showed that he was ignorant of the contract at the time it was made, and never saw it until after this suit was brought; that he had no money to pay upon it and did pay none; and that his father told him what had been paid on the contract was to be recovered back in his, the son's, name. The father was sworn as a witness, and testified that he made the

contract and paid the money for his son, and that the son afterward, on being informed of it, assented to what had been done. There is some complaint of refusal or unwillingness on the part of the defendant to perform the contract on his part, and on the contrary he relies upon it as a valid contract, and offers to perform, but the suit appears to be grounded upon the right of an infant to disaffirm his contract and recover back what has been paid upon it.

I. Obviously the first question in the case is, how this infant, who had nothing to do with the making of this contract in the first place, has become entitled to any benefit under or because of it. If he has any right at all, it would seem that he must have acquired it in one of three ways; no other being conceivable. These are :

1. By virtue of the contract itself, made in his name, and which, though made without his knowledge, purported to assure to him rights which we may suppose were of value.

2. By the adoption of the act of his father in making the contract.

3. By accepting the contract as a gift from his father.

It is not claimed, as we understand it, that by the contract itself, independent of any action afterward taken, the infant would have had any rights at all. No contract is binding upon any party until he assents to it. Even a deed must be delivered and accepted; and much more must a contract be which contains onerous conditions, and assumes to bind the party to the payment of a large sum of money. Any suggestion therefore, that the contract as made entitled the infant to any rights, may be dismissed from consideration. If when made it was a valid contract in favor of any one as vendee, it must have been in favor of the father, who, having made it in the name of another person without authority, might possibly have been compelled to perform it as his own contract, and been entitled to the benefit of it as his own. What rights there may have been by or against him, we need not consider, as they are not involved in this litigation.

II. If the contract became that of the infant through the

adoption of the act of his father in making it, it must be because the infant has thus retrospectively made the father his agent. This, and this only, must be the force of the adoption; it is giving authority retrospectively, by claiming as his own that which without authority at the time was done in his name.

Had the infant in the first place undertaken to make another his agent to enter into the contract for him, the appointment would not have been valid. On the authorities no rule is clearer than that an infant cannot empower an agent or attorney to act for him: *Whitney v. Dutch*, 14 Mass. 457, 460; *Lawrence's Lessee v. McArter*, 10 Ohio, 37; *Fonda v. Van Horne*, 15 Wend. 631, 635; *Trueblood v. Trueblood*, 8 Ind. 195; *Cole v. Pennoyer*, 14 Ill. 158; *Knox v. Flack*, 22 Pa. St. 337; *Sadler v. Robinson*, 2 Stew. (Ala.) 520; *Robbins v. Mount*, 4 Robt., N. Y. 553. But if he cannot appoint an agent or attorney, it is clear he cannot affirm what one has assumed to do in his name as such. He cannot affirm what he could not authorize: *Doe v. Roberts*, 16 M. & W. 778, 781; *Fonda v. Van Horne*, 15 Wend. 631, 636; *Trueblood v. Trueblood*, *supra*. It would be extraordinary if a party who has no power to do a particular act could yet do it indirectly by the mere act of adoption. Such a doctrine would deprive the infant wholly of his protection; for one has only to change the order of proceeding, assume to act for the infant first and get his authority afterward, and the principle of law which denies him the power to give the authority is subverted. But such a doctrine is wholly inadmissible. The protection of infancy is a substantial one, and is not to be put aside and overcome by indirect methods.

III. Did the infant become entitled to the contract by the gift of his father? That he did, might perhaps be claimed with some degree of plausibility had the payment made on the contract been the whole or the principal part of the purchase price. But the payment was in fact insignificant when compared with what remained to be paid. If the infant took the contract, he took it with all its conditions, one of which

was the payment of the sum of \$12,600 in the manner provided for therein. Now there can be no presumption whatever that such a gift was for the benefit of the infant, and even if he were an adult, acceptance could not be presumed without some express evidence to establish it. In this case, instead of there being evidence that the infant accepts the contract, the suit itself assumes that he rejects it.

But treating the act of the father as a gift to his son, how does this entitle the son to demand and receive back the \$400 paid on the contract? This sum never belonged to the son, and there is no pretense that it was ever given to him. The gift was of a right under the contract acquired by means of the payment of this sum. This right is offered to the son, and according to the testimony of the father, he at first accepts it, but then turns around and says in effect: "No, I will not take this right, but I will demand and have what was paid for it." If he may do this, then what he obtained from his father was not the contract itself, but the right to repudiate the contract. But the right to repudiate a contract is not the subject of gift at all. Besides the father never had it to give. If the contract was valid in his hands, he could not repudiate it, and he could not empower another to do what he could not do himself.

In what has thus far been said, we have not touched upon the authority of the infant to disaffirm a contract of purchase before coming of age. If the contract had become his in any way, it would be, we take it, only a voidable contract, and in *Dunton v. Brown*, 31 Mich. 182, the right to disaffirm a voidable contract during infancy was denied. But it is enough in this case to show that the infant never became entitled either to the contract or to the moneys paid under it.

The judgment must be affirmed, with costs.

Lawrence v. McArter, 10 Ohio, 37; *Bennett v. Davis*, 6 Cow. 393; *Cole v. Pennoyer*, 14 Ill. 158; *Fonda v. Van Horne*, 15 Wend. 631, 635; *Philpot v. Bingham*, 55 Ala. 435; *Knox v. Flack*, 22 Pa. St. 337; *Mechem*, 51, 56; *Trueblood v. Trueblood*, 8 Ind. 195.

Some cases hold that an infant can appoint an agent to perform an act unquestionably for his interest: *Tucker v. Moreland*, 10 Pet. (U. S.) 58; *Whitney v. Dutch*, 14 Mass. 457.

3

MARRIED WOMEN AND ALIENS.

Under the common law married women and aliens, not having legal capacity to contract, cannot be principals.

KENTON INS. CO. *v.* McCLELLAN.

Supreme Court of Michigan, 1880.

43 Mich. 564.

CAMPBELL, J. Plaintiff sued defendant, who is a married woman, upon a promissory note made by her and payable to the order of plaintiff for \$290.42, dated September 4, 1877, and payable at nine months. She defends on the ground that the note was not given on such a consideration as binds her.

A preliminary objection that this defense was waived by failure to file affidavit under Rule 79 has no force. Defendant does not dispute the execution of the note. Her defense is want of capacity to make it, except on a particular consideration.

It has been held uniformly by this Court that our statutes do not authorize a married woman to become personally liable on an executory promise except concerning her separate estate. A note given for any other consideration is void: *De Vries v. Conklin*, 22 Mich. 255; *West v. Laraway*, 28 Mich. 464; *Emery v. Lord*, 26 Mich. 431; *Ross v. Walker*, 31 Mich. 120; *Jenne v. Marble*, 37 Mich. 319; *Kitchell v. Mudgett*, 37 Mich. 81; *Carley v. Fox*, 38 Mich. 387; *Johnson v. Sutherland*, 39 Mich. 579; *Russel v. People's Savings Bank*, 39 Mich. 671; *Gantz v. Toles*, 40 Mich. 726.

It has also been settled that there is never any presumption of validity of such an undertaking, whether negotiable or not, and that proof must always be given of such a consideration as will bind her. We think that the rule must apply whether value received is expressed or not, because the power is not general, but statutory, and cannot be extended beyond the constitutional and statutory limits. See *Powers v. Russell*, 26 Mich. 179; *Emery v. Lord*, 26 Mich. 431; *West v. Laraway*, 28 Mich. 464; *Johnson v. Sutherland*, 39 Mich. 579.

It was held in the latter case that a *bona fide* holder was no better off than any one else, as against the disability of coverture. But inasmuch as plaintiff here is the original payee, it is not a *bona fide* holder: *Rickle v. Dow*, 39 Mich. 91.

The evidence showed without contradiction that this note was given by defendant to her son, August Kuenzel, to use as security for a debt of a firm of Wright & Kuenzel, in which he was a partner. That he gave it to one Jackson, plaintiff's agent, and took back from him an assignment to defendant from plaintiff of that debt, which had already been executed by plaintiff and was in Jackson's hands. Defendant never knew of this and never authorized it.

A married woman cannot give to an agent any power which she does not possess herself, and cannot therefore appoint any agents that could bind her except concerning her property. Persons dealing with them must inquire into their powers. In the present case there is no evidence tending to show that any such inquiry was made, or that plaintiff or its agent acted in reliance upon any supposed authority, or in ignorance of the facts. The record is not inconsistent with the possibility that Jackson and the plaintiff made the assignment as a mere sham. There is no evidence or any bargain for an assignment supposed to have been made on the credit of defendant. All that appears is a delivery of an assignment which had already been executed, in exchange for defendant's paper. It does not appear that the bargain was made at this time, if it was made at all, and there is no pretense that any earlier bargain or negotiation was made really or ostensibly on defendant's behalf.

When the case was closed, therefore, no cause of action was made out, and the Court properly directed a verdict for defendant.

The judgment must be affirmed with costs.

Mechem, 56; *Schouler Dom. Rel.* 58; *Weisbrod v. Chicago & Northwestern Ry. Co.*, 18 Wis. 40; *McLaren v. Hall*, 26 Iowa, 297; *Rowell v. Klein*, 44 Ind. 290.

In most of the American States this disability is partly or altogether re-

moved by statute: N. Y. Rev. Stats., p. 2606, L. 1884, ch. 381; Mass. Pub. Stats., ch. 147, § 2; Minn. Gen. Stats., 1878, ch. 69, § 2.

Husband can be wife's agent: *Comfort v. Sprague*, 31 Minn. 405. Wife can be husband's agent: *Meador v. Page*, 39 Vt. 306.

4

PERSONS NON COMPOS MENTIS.

Persons non compos mentis, not having natural capacity to contract, cannot be principals. If, however, the condition of the principal's mind is unknown to the other party and the agreement is fair and equitable, the unsoundness will not vitiate the contract.

MATTHEISSEN REF. CO. *v.* McMAHON'S ADM'R.

Court of Errors and Appeals of New Jersey, 1876.

38 N. J. L. 536.

DEPUE, J. The controversy in this case was between the administrator of McMahon and the Refining Company with respect to the title to certain property—barrels and cooperage stock.

The defendants claimed property in the goods under an alleged purchase from McMahon, at an interview between him and the president of the company on the 2d of December, 1871.

There was some testimony of the sale of the same property to the defendant, negotiated by one Shandly, under a power of attorney from McMahon, but as the title relied on at the trial was mainly under the agreement of the 2d of December, and as the questions raised by the bill of exceptions are common to both transactions, the case will be treated in respect to the agreement entered into at that time.

At the time of the interview of the 2d of December, McMahon was indebted to the company in the sum of about \$11,000. It will be assumed that a bargain was then concluded that McMahon should sell the goods to the company

in payment of his indebtedness, and that the property in them should pass to the company immediately.

* * * * *

Exception was taken to the charge of the Court as to the effect of the insanity of a contracting party on his contracts.

The goods, in fact, were delivered into the possession of the defendants by Shandly, the superintendent of McMahon's business. The effect of this delivery was met by the plaintiff by testimony that McMahon was incapable of transacting business during the time of the delivery, by reason of insanity. There was evidence that the deceased exhibited symptoms of a disordered intellect as early as the commencement of the delivery of the goods, which continued until his death.

The Judge having charged that there was no evidence of part payment, to make the contract good within the statute of frauds, and that its validity was dependent on a delivery and acceptance of the goods sold, or of some part thereof, submitted as the question for the jury whether McMahon was competent to make the bargain, and, if so, whether his competency continued so as to enable him to complete and perfect the bargain by delivery. This presentation of the question, as well as the instruction that the burden of proving the mental incapacity of the deceased, was on the plaintiff, and that the plaintiff must satisfy the minds of the jury, by the proof he adduces of that fact, were correct.

The instruction was, that the contracts of lunatics and insane persons were invalid, and not binding, with a qualification that if Mattheissen, acting as the agent of the company, was dealing with McMahon or his agent in the ordinary course of business, in good faith, without any knowledge of the insanity or mental disturbance of McMahon, and without the knowledge of such circumstances as would put a reasonably prudent man upon inquiry, made the bargain in good faith, then that would be a good bargain, and neither McMahon nor his representative could set up the insanity against it. Exception was taken to the refusal of the Judge to add a direc-

tion that nothing but imposition on an insane person will avoid his contract.

The instruction as given is in accord with the principle established by the modern English cases and the decisions of our Courts, as the general rule in dealing with the contracts of lunatics: *Yauger v. Skinner*, 1 *McCarter*, 389; *Eaton v. Eaton*, 8 *Vroom*, 108; *Molton v. Camroux*, 2 *Exchq.* 487; s. c., 4 *Ib.* 17; *Beavan v. McDonell*, 9 *Ib.* 309; *Elliott v. Ince*, 7 *DeG., M. & G.* 475.

There is a class of cases such as *Baxter v. Earl of Portsmouth*, 2 *C. & P.* 178, in which imposition upon a lunatic—advantage taken of his mental infirmity—is held to be an essential ingredient of the defense. But these are cases of contracts for necessities—contracts which lunatics, known to be such, are capable of entering into and are exceptions to the general rule. Other contracts with lunatics not strictly for necessities—which have been fully executed, and on which a consideration of benefit to the lunatic has been given, may be within the reason of this exception, where the transaction is shown to be perfectly fair and reasonable, at least, so far as to allow the recovery back of the consideration given, or to prevent a rescission by the lunatic or his representatives, without restoring the consideration, whenever a restoration is practicable. The liability of the lunatic in such cases is upheld, not on the ground of the contract, but on the fact that the lunatic has received and enjoyed an actual benefit from the contract. This view is advanced by *POLLOCK, C. B.*, in *Gore v. Gibson*, 13 *M. & W.* 626, and by *REDFIELD, C. J.*, in *Lincoln v. Buckmaster*, 32 *Vt.* 658. On this principle *Brown v. Jodrell*, 3 *C. & P.* 30; *Dane v. Kirkwall*, 8 *Ib.* 675; *Niell v. Morley*, 9 *Vesey*, 478; *Selby v. Jackson*, 6 *Beavan*, 192; and the observations of *SHAW, C. J.*, in *Arnold v. Richmond Iron Works*, 1 *Gray*, 434, may be reconciled with the other cases.

In *Eaton v. Eaton*, the Court treated the effect of the consideration given as overcome by proof of imposition and actual fraud in obtaining the conveyance. But this case is

not within any of these exceptions. The defendants did not part with any money or consideration of value under this contract. They proposed merely a credit of the contract price on an existing indebtedness, which was rendered nugatory by the operation of the statute of frauds.

The general rule, which must govern this case, is, that absence of knowledge of the insanity of the party, as well as fairness in other respects, must concur to give validity to a contract with a lunatic. Knowledge or information, such as would lead a prudent person to the belief of the incapacity, is such evidence of bad faith as will avoid the contract: *Lincoln v. Buckmaster*, 32 Vt. 652. In *Yauger v. Skinner*, the rule is stated by Chancellor GREEN to be, "that if the proof be clear that an executory contract to purchase was made in good faith, and for a full, fair price, when the lunacy of the vendor was neither known nor suspected, and that the contract was executed on the part of the purchaser without knowledge or belief of the existence of the incapacity of the grantor, the contract will be upheld." In *Elliott v. Ince*, Lord CRANWORTH states the result of the authorities to be, "that dealings of sale and purchase by a person apparently sane, though subsequently found to be insane, will not be set aside as against those *who have dealt with him on the faith of his being a person of competent understanding*." In *Price v. Berrington*, 7 Hare, 402, Vice-Chancellor SHADWELL says: "I do not understand it to be denied, that if the party treating with the lunatic knew of the lunacy, that is a fraud." In *Molton v. Camroux*, as reported in 2 Exchq. 501, POLLOCK, C. B., says: "The rule, as laid down by Littleton and Coke, has, no, doubt, in modern times been relaxed, and unsoundness of mind would now be a good defense, if it could be shown that the defendant was not of capacity to contract, and the plaintiff knew it." In *Beavan v. McDonell*, 9 Exchq. 309, the action was by a lunatic to recover back a deposit made on a contract to purchase lands. To a plea alleging receipt of the money under the contract, the plaintiff replied, that when the contract was made, and money paid, he was a lunatic and incapable of contracting, and that the con-

tract was not of any benefit to him, and averred that the defendant, at the time, etc., had notice. The defendant rejoined that neither the vendors nor the defendant, when the plaintiff made the contract, or paid the money, "knew that he was a lunatic or of unsound mind, and incapable, by reason of unsoundness of understanding the meaning of a contract, but made the said contract with him fairly and in good faith, believing that he was able to understand the same." In none of the pleadings was any illusion made to imposition or advantage taken of the lunatic in the bargain. The defense was made solely on the ground of unsoundness of mind and knowledge of that fact by the opposite party; and by the rejoinder, an issue was tendered on the averment of knowledge. On demurrer to the rejoinder the pleadings were held to be good. The case was afterward tried on that issue, and resulted in a verdict for the plaintiff, which was sustained, as appears by the report of the case in 10 Exchq. 183.

In *Gore v. Gibson*, 13 M. & W. 623, to an action against an indorser of a bill of exchange, the defendant pleaded that when he indorsed the bill he was so intoxicated, and thereby so entirely deprived of sense, understanding, and the use of his reason as to be unable to comprehend the meaning, nature, or effect of the indorsement, or to contract thereby, of which the plaintiff, at the time of the indorsement, had notice. On demurrer it was contended that the plea, to be good, should have averred that the intoxication was procured by the plaintiff, or that he took advantage of it. The Court nevertheless held the plea to be good. In *Matthews v. Baxter*, L. R. 8 Exch. 132, the plea was in the same form.

The instruction given without the addition prayed for, was as favorable to the defendants as the facts would warrant.

The instruction that the agency of Shandly was revoked by the insanity of his principal, as qualified by the passage above quoted, was correct.

Notwithstanding the declaration of Chancellor KENT (2 Kent, 645), "that the better opinion would seem to be that the fact of the existence of the lunacy must have been previously,

established by inquisition, before it could control the operation of the power," the weight of authority, as well as sound reasoning, lead to the conclusion that the after-occurring insanity of the principal operates *per se*, as a revocation or suspension of the agency, except in cases where a consideration has previously been advanced in the transaction which was the subject-matter of the agency, so that the power became coupled with an interest; or where a consideration of value is given by a third person, trusting to an apparent authority in ignorance of the principal's incapacity: Story on Agency, § 481; Bunce v. Gallagher, 5 Blatch. C. C. 481; Davis v. Lane, 10 New Hamp. 156. Justice STORY states the principle to be that "as the party himself, during his insanity, could not personally do a valid act, his agent cannot, in virtue of a derivative authority, do an act for and in his name which he could not lawfully do for himself." From this principle the conclusion inevitably results that transactions of third parties, which, under the circumstances, would be invalid if had directly with the principal, must be equally invalid though they be done with the agent. Saving the rights of persons who, before the insanity intervened, became interested in the power by reason of a consideration advanced, or who, in ignorance of the incapacity, in good faith parted with a consideration of value, relying on the apparent authority of the agent, complete justice will be done, and the law on this subject be made to harmonize.

Molton v. Camroux, 2 Ex. 487; Mechem, 47, 48; Story, 6; Wharton, 10; Behrens v. McKenzie, 23 Ia. 333; Young v. Stevens, 48 N. H. 133; N. W. Mut. Fire Ins. Co. v. Blankenship, 94 Ind. 535.

C

WHO CAN BE AGENTS.

1

IN GENERAL.

Any person of sufficient intelligence to comprehend instructions may be an agent.

LYON *v.* KENT.

Supreme Court of Alabama, 1871.

45 Ala. 656.

KENT, PAYNE & Co., the plaintiffs, were residents of Richmond, Va., on January 17, 1865, and owned certain cotton which was in the custody of their agent in Alabama. On the above-mentioned date they gave to James W. Singleton, a citizen of Illinois, an order on said agent for all the cotton belonging to them in his hands. Singleton sold the cotton to one Guy, who stored it with Lyon & Co., defendants herein. Plaintiffs bring this action of detinue for the cotton, alleging that the order given to Singleton was given simply to enable him to take possession of the cotton as agent of plaintiffs and save it from confiscation as contraband goods. Defendants claim that the transfer to Singleton was absolute. There was judgment for plaintiffs and defendants appealed.

PETERS, J. The only negotiation that Singleton had with the firm of Kent, Payne & Co., touching the cotton, took place in January, 1865, at Richmond, Virginia. If there was a sale at all, or any contract entered into between Singleton, a citizen of Illinois, and Kent, Payne & Co., citizens of Virginia, by which any title or interest in the cotton was attempted to be passed from the one to the other, it was wholly void and incapable of ratification. No trading between these parties was then allowable without a permit of the government. And the President's pass was not sufficient for that purpose: *McKee v. United States*, 8 Wall. 163, 166; *The Ouachita Cotton*, 6 Wall. 521, 531; *Brown v. Tarkinton*, 3 Wall. 377, 381; *Kennett v.*

Chambers, 14 How. 38, 50. Then, the order alone warned all who looked upon it, who knew the domicile of the parties to it, that it could not be evidence of a legal title. And it was not, unconnected with other proof, a power to sell or dispose of the cotton.

Yet, though the order of itself was not evidence of a sale to Singleton, or a power to sell, it shows that the owners of the cotton had authorized him to *take possession* of it. This he could do as the agent of the owners. This was not forbidden to him or to them by law or the policy of the government. They could change the agency of the custody of their cotton from one person to another. And they could make any person, capable of acting as an agent, such agent to take possession of their property for them, and keep it for them. They could transfer its custody from Browder to Singleton without a violation of law. The objection which might be supposed to exist to such an agency during the war, ceased as soon as the war was ended; and its purpose being then legal, it might be legally consummated. Any one, except a lunatic, imbecile, or child of tender years may be an agent for another. It is said by an eminent author and jurist, that "it is by no means necessary for a person to be *sui juris*, or capable of acting in his or her own right in order to qualify himself or herself to act for others. Thus, for example, monks, infants, *femes covert*, persons attainted, outlawed or excommunicated, villains and aliens, may be agents for others:" Story's Agency, §§ 6, 7, 9. So, a slave, who is *homo non civilis*, a person who is but little above a mere brute in legal rights, may act as the agent of his owner or his hirer: *Powell v. The State*, 27 Ala. 51; *Stanley v. Nelson*, 28 Ala. 514. It was then, certainly not unlawful, or against the public policy of the nation, for Kent, Payne & Co. to keep their cotton, and keep it safely, during the late rebellion. It is the undoubted law of agency, that a person may do through another what he could do himself in reference to his own business and his own property; because the agent is but the principal acting in another name. The thing done by the agent is, in law, done by the principal. This is

axiomatic and fundamental. It needs no authorities to support it. *Qui facit per alium, facit per se*: Broom's Max., marg. ; 1 Pars. Con., 5th ed. p. 39, *et seq.*; Story's Agency, § 440. And to this it may be added, that an agent dealing with the property of his principal, must confine his acts to the limit of his powers; otherwise, the principal will not be bound: 1 Pars. Cont. 41, 42, 5th ed.; Powell v. Henry, 27 Ala. 612; Botts v. McCoy *et al.*, 20 Ala. 578; Allen v. Ogden, 1 W. C. C. 174. And it is also the duty of one dealing with an agent to know what his powers are and the extent of his authority: Van Eppes v. Smith, 21 Ala. 317; Owings v. Hull, 9 Pet. 608. Then, the agency to receive the delivery of the cotton from Browder, in compliance with the order, was not illegal. If it went beyond that it was void. And those who dealt with Singleton were bound to know this as they were bound to know the law.

The judgment of the Court below is affirmed.

Wharton, 13-18; Story, 7; Bishop Con. 1034-1036; Mechem, 57.

2

EXCEPTION.—INCOMPATIBLE DUTIES.

An agent cannot assume incompatible duties nor have any interests adverse to those created by the agency.

TAUSSIG v. HART.

New York Court of Appeals, 1874.

58 N. Y. 425.

APPEAL from judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in favor of defendant, entered upon the report of a referee.

This action was brought to recover a balance alleged to be due plaintiffs by defendant, on account of various stock speculations. Plaintiffs were copartners, doing business in the city of New York as stock and gold brokers.

On or about the 25th day of October, 1866, the parties entered into a contract whereby the plaintiffs agreed to purchase and sell as brokers, for the defendant such stocks and gold as he should direct, upon the conditions, that the defendant should deposit with the plaintiffs as marginal security at least ten per cent. of the amount invested in such stocks and gold, and that the plaintiffs should advance the necessary funds in addition to any funds in their hands belonging to the defendant, to pay for such stocks and gold so purchased, and that they should apply all funds received by them for stocks and gold sold for defendant, and all funds received by them as dividends upon defendant's stocks in their hands, and all funds deposited by defendant with them as marginal security, upon such moneys so advanced by them, or so much thereof as should be necessary to repay them for all such advances and for their commissions for buying and selling and interest upon all balances in their favor from time to time upon advances so made, at the rate of seven per cent. per annum; and that the plaintiffs should be entitled to commissions for buying and selling such stocks and gold at the rate of one-eighth of one per cent. each way, upon the par value of such stocks and gold. All stocks and gold purchased or sold to be purchased or sold *regular*, that is to be delivered the next business day after the purchase or sale thereof.

Under this contract large amounts of stocks and gold were bought and sold. The only items in dispute were two, in reference to which the referee found, in substance, as follows: The plaintiffs on the 3d day of January, 1868, purchased on account of defendant one hundred shares Pacific Mail at 113, receiving a certificate thereof. On the same day they sold on their own account one hundred shares of the same stock at 113½, and without the consent of defendant delivered to the purchaser the said certificate. On the 17th of March, 1868, plaintiffs sold all of the Pacific Mail stock belonging to themselves, and had no stock to deliver to defendant. On the day last mentioned Pacific Mail was worth 109½.

On or about February 29, 1868, defendant directed plaintiffs

to purchase one hundred shares Pacific Mail "regular." Plaintiffs on that day purchased one hundred shares at thirty days "seller's option," at $111\frac{1}{8}$. On the same day they transferred on their books to defendant, without his knowledge, one hundred shares belonging to themselves, for which, on the next business day, March 2, 1868, they charged him $111\frac{3}{8}$ per share, with a commission for the purchase amounting in all to \$11,150.

As matters of law the referee found : That the plaintiffs did not purchase the one hundred shares of Pacific Mail stock, as directed on the 29th day of February, 1868, for which they charged him on the 2d day of March, 1868. That the transaction in relation to said stock did not bind defendant, and that he is not liable for said stock.

That the plaintiffs, on the 17th day of March, 1868, wrongfully converted to their own use the one hundred shares of the capital stock of the Pacific Mail Steamship Company, the property of the defendant, bought for him on the 3d day of January, 1868, and that the defendant was entitled to offset in this action, as of that day the value of said stock on that day, \$10,962.50.

RAPALLO, J. The defendant had a right to repudiate the alleged purchase of one hundred shares of Pacific Mail stock of which he was notified February 29, 1868, as soon as the facts came to his knowledge. No such purchase as that stated in the notice had been made. The purchase from Mr. Williams was not at $111\frac{3}{8}$ regular, as stated in the notice, but was in fact at $111\frac{1}{8}$, seller's option, thirty days. That was not a compliance with the defendant's order, which was to buy the stock "regular" and the defendant was not bound to recognize the purchase from Mr. Williams. But the plaintiffs allege that they transferred to the defendant's credit one hundred shares of their own stock at $111\frac{3}{8}$, on the day when the stock would have been deliverable had it been bought "regular." That transaction did not help the matter. It amounted to a sale by the plaintiffs of one hundred shares of their own stock to the

defendant, which was not binding upon the defendant, for the reason that the law does not permit an agent employed to purchase, to buy of himself. It is no answer that the intention was honest and that the brokers did better for their principal by selling him their own stock than they could have done by going into the open market. The rule is inflexible, and although its violation in the particular case caused no damage to the principal, he cannot be compelled to adopt the purchase. Consequently, whether the purchase of one hundred shares from Williams was for defendant's account, or the plaintiffs sold to the defendant one hundred shares of their own stock, on either theory the referee was justified in rejecting that item of the account.

The credit to the defendant of the value of one hundred shares of Pacific Mail stock as of the 17th of March, 1868, was, in our opinion, properly allowed by the referee. Whether the relation of pledgor and pledgee exists between a broker and his customers, or whether the broker holds the stock under a special contract, makes no difference in the result. The broker is in either case bound to keep at all times on hand or under his control, either the particular shares purchased for his customer, or an equal amount of other shares of the same kind, and to have them in such a situation that the customer, on paying the amount due by him thereon, can at any time obtain them. In the present case the plaintiffs, on the 3d of January, 1868, purchased on defendant's order one hundred shares of Pacific Mail stock at 113 $\frac{1}{8}$, and charged him therefor \$11,312.50, and received from the seller a certificate for such one hundred shares. On the same day they sold one hundred shares of such stock, and on such sale delivered the identical certificate they had received on the purchase which they had made for defendant's account. If they had had no other shares on hand at the time it would be quite clear that they had sold the defendant's shares, and that on learning of such sale the defendant could have adopted and claimed the benefit of it, or, as many cases hold, claimed the value of the shares as upon a conversion thereof by the plaintiffs to their own use. But

the plaintiffs did at the time hold other shares of their own, which they could have delivered to the defendant. They, however, between that time and the 17th of March, 1868, sold and delivered all of these shares, and thereafter held none of the same kind of their own or which they could have delivered to the defendant, and went short of the stock. The most that they can claim is that so long as they had any one hundred shares of Pacific Mail stock on hand, they had not sold the defendant's shares; but when they sold their last one hundred shares and failed to keep any on hand to meet their obligation to the defendant, such sale must, according to the doctrine of all the cases, be deemed to have been a sale of the defendant's shares. He could ratify and claim the benefit of the sale, or claim the value of the shares on the day of sale. The referee has charged the plaintiffs with the value of one hundred shares at 109 $\frac{5}{8}$, which was the market value on the 17th of March, 1868.

The subsequent acquisition by the plaintiffs, after the stock had fallen to a very low figure, of a sufficient number of shares to replace those which they had held for account of the defendant, did not relieve them from liability. Such re-acquired stock was never accepted by the defendant, and he was in fact ignorant of the transactions. To allow a broker to sell his customer's stock without authority, and speculate upon replacing it at a lower price would be encouraging speculations by agents at the risk of their principals, totally inadmissible under familiar rules. Should the stock rise largely in price after the broker had thus divested himself of all control over the shares which he had purchased on the order of his principal, the broker might be unable to replace the shares, and the principal would have no remedy except a personal claim against the broker. This clearly is not what is contemplated under an agreement to buy and carry stocks. The customer does not rely upon an engagement of the broker to procure and furnish the shares when required, but upon his actually purchasing and holding the number of shares ordered, subject only to the payment of the purchase-price.

These are the principal points raised and argued on this appeal. None of the others are, in view of the findings of fact of the referee, sufficient, in our opinion, to justify a reversal of the judgment.

Judgment affirmed.

Mechem, 66, 68; *Walker v. Palmer*, 24 Ala. 358; *Bunker v. Miles*, 30 Me. 431; *Bentley v. Columbia Insurance Co.*, 19 Barb. 595; *Crump v. Ingersoll*, 44 Minn. 84.

A person cannot act as the agent of two principals having opposing interests unless he does so with their full knowledge and consent: *Meyer v. Hanchett*, 39 Wis. 419; *Rice v. Wood*, 113 Mass. 133; *Scribner v. Collar*, 40 Mich. 375.

D

JOINT PRINCIPALS AND AGENTS.

1

GENERAL RULE AS TO JOINT PRINCIPALS.

The general rule is that a tenant in common or joint tenant has no implied authority to act as agent for the other co-owners.

SEWELL v. HOLLAND.

Supreme Court of Georgia, 1878.

61 Ga. 608.

BLECKLEY, J. 1. There is no dispute that Willis and Young owned the land as tenants in common; that Willis bargained it in writing to Sewell, who paid at least a part of the purchase-money, and went into possession, claiming the whole of it under this purchase; that Willis did not attempt to sell his interest only, but attempted to sell to Sewell the interest of Young also, holding himself out as authorized by Young so to do; and that Young's interest was afterward formally conveyed to Holland. It is insisted that if Sewell had actual possession and claimed the whole land, especially if he had paid all the purchase-money, Young was ousted, whether he had ever authorized the sale of his interest or

not, or whether he ever ratified the sale or not; and that, though Sewell may not in fact have acquired Young's interest, yet, as he claimed to have acquired it, he did not become a tenant in common with him, and therefore the remedy by partition cannot be available to Holland, Young's vendee. But we think that, though Sewell may have believed that he owned the whole land, still, if he in fact owned no more than the interest of Willis, he would occupy to Young the relation which Willis previously occupied; that is, the two would be tenants in common. Of course, Young's subsequent vendee would take Young's place in that relation; and so, if Young neither authorized nor ratified the sale by Willis to Sewell, Holland and Sewell became tenants in common. See 26 Ga. 515; 52 Ib. 637; 56 Ib. 659.

2. If Young either authorized or ratified the sale by Willis, he could not afterward and whilst Sewell was in possession, claiming the whole land, convey a better title to Holland or to Holland's attorney than he himself then had. Sewell's possession would so protect him that Young could convey no title to another which he himself could not assert against Sewell, possession being notice to all the world, if not of what the possessor actually claims, at least of what he is entitled to claim rightfully. Holland can stand in Young's shoes, but not in a new and better pair. This is so, whether Sewell has paid all the purchase-money or not. Holland can have partition, if Young could have it were the conveyances under which Holland now claims through Young out of the question; otherwise, he cannot have it. Sewell's possession prevented Young from placing Holland any higher than the exact position in which Young stood.

3. It matters not that Holland may have acquired title in whole or in part by compounding a felony. Sewell is not interested in that question. No such consideration appears on the face of either of the deeds. The deeds are executed contracts, and Young, the maker, is not complaining of them. Sewell has no right to volunteer a complaint for him. Indeed, it is not apparent how even Young could avoid them

were he so disposed. It is enough for all Sewell's rights, legal or equitable, that he is allowed to stand in this contest just as if he were resisting Young.

What we have ruled will be found to comprehend the whole substance of the case, except the matters of fact which are for the jury.

Judgment reversed.

Mechem, 71; *Reiman v. Hamilton*, 111 Mass. 245; *Story*, 39; *Harris v. Johnston*, 54 Minn. 177.

A power of attorney from two to sell their land is not a power to sell the several land of either: *Hersey v. Lambert*, 50 Minn. 373.

2

EXCEPTION.—PARTNERSHIP.

In the case of a partnership the rule is different. Here the act of any member within the scope of the partnership business binds the firm.

DEAKIN v. UNDERWOOD.

Supreme Court of Minnesota, 1887.

37 Minn. 98.

MITCHELL, J. This was an action to compel specific performance of a contract for the sale of real estate. Plaintiff alleges that the defendant made the contract "by A. B. Wilgus, his duly authorized agent and attorney-in-fact." The contract is attached as an exhibit to the complaint, and is signed: "O. W. UNDERWOOD, By A. B. WILGUS, Agent."

It appears from the evidence that the authority to sell was given to the firm of A. B. Wilgus & Bro., a partnership composed of A. B. Wilgus and E. P. Wilgus. It is claimed that, upon this state of facts, there was a failure of proof. But the material allegation of the complaint was that defendant had made his contract with plaintiff. It was not necessary to allege that it was made through an agent. It would have been enough to declare upon it generally as of the personal act of the principal. The substance of the issue was not whether

defendant had made the contract through an agent, but whether he had made it at all. Hence it cannot be said that there was a failure of proof. The most that can be possibly claimed is that there was a variance between the allegation and proof, but which could not, in this case, have misled the defendant to his prejudice, and therefore is not material.

2. Defendant further contends that the authority to sell being to the firm of A. B. Wilgus & Bro., which was composed of two members, this authority could only be executed by the two jointly, and not by one separately, so as to bind the principal. In support of this contention, he invokes the well-known general rule of the common law that, where an authority to do an act is conferred upon two or more agents, the act is valid to bind the principal *only* when all of them concur in doing it; the power being joint and not several: *Rollins v. Phelps*, 5 Minn. 373 (463). Even where the authority is given to several agents, this rule is not so rigid and inflexible as to overcome the apparent intention of the parties to the contrary: *Story, Ag.*, §§ 42, 43; *Hawley v. Keeler*, 53 N. Y. 114. But we think the rule has no application where the authority is given to a partnership as such. Each member of a partnership is the agent of the firm, and all the partners are jointly accountable for the acts of each other; and, where a person appoints a partnership as his agent, he must be deemed to have done so with reference to these rules of law. When a person delegates authority to a firm, it is an appointment of the *partnership* as his agent, and not of the individual members as his several and separate agents. Hence each partner may execute, and the act of one is the act of the firm, and in strict pursuance of the power: *Gordon v. Buchanan*, 5 Yerg. 71.

But it is claimed that, conceding this, he must do it in the name of the firm, and that if, as in the present case, he uses his individual name, it is not the act of the partnership, and will not bind it. The defendant seems to overlook the fact that the contract is the act of the principal and not of the agent, and that the party to be bound is the former and not the latter.

Hence the important question is whether the principal's name has been signed to the contract by one having authority to do so. That in this case, A. B. Wilgus, as a member of the firm of A. B. Wilgus & Bro., had, by virtue of the authority given the firm, power to execute this contract in the name of defendant, cannot be questioned, and it is wholly immaterial whether to that name he added "by A. B. Wilgus & Bro.," or "by A. B. Wilgus," or nothing at all. An agent authorized to sign the name of his principal effectually binds him by simply fixing to the instrument the name of his principal, as if it were his personal act. The particular form of the execution is not material, if it be done in the name of the principal, and by one having authority in fact to execute the instrument: *Berkey v. Judd*, 22 Minn. 287, 302; *First National Bank v. Loyhed*, 28 Minn. 396 (10 N. W. Rep. 421); *Devinney v. Reynolds*, 1 Watts & S. 328; *Forsyth v. Day*, 41 Me. 382.

3. The authority to the firm was to sell for one-half cash; and the other half payable *on or before one year*. They sold for one-half cash, and the other half payable *in one year*. It is claimed that this was unauthorized, and therefore the principal not bound. The terms of the contract, as executed, so far as they affect the rights of defendant, were in legal effect the same as those authorized. By each he would be entitled to demand payment in one year, and not before. The distinction between this case and one where the facts are exactly reversed (such as *Jackson v. Badger*, 35 Minn. 52; 26 N. W. Rep. 908), will be apparent on a moment's reflection.

4. The contract contained a provision that if the title to the premises "is not good, *and cannot be made good*, this agreement shall be void," and the earnest-money refunded. Upon examination of the title, it was discovered that the land had been bid in by the State, at the tax sale of 1883, for the taxes of 1882, for the sum of \$15, and the certificate of sale subsequently assigned (when does not appear) to one Billson. After waiting some time to have the defect in the title removed, and it not being done, plaintiff offered to take defendant's warranty deed (as provided in the contract), with

the title as it was. Defendant declined to do this, claiming that, under the provision of the contract referred to, he had a right, if the title could not be made good, to declare the contract at an end. We need not determine whether or not this position is sound. Assuming that defendant's construction of the contract is correct, it is at least incumbent upon him to prove affirmatively *that the title cannot be made good*. This he has not done. He has neither proved that the notice of the expiration of redemption required by law had been given, or that the assignment to Billson was made after forfeiture to the State, so as to bring the case within *State v. Smith*, 36 Minn. 456 (32 N. W. Rep. 174). Therefore, for anything that appears, the right of redemption from this tax sale still continues, and the title to the land could be made good by paying \$15, and interest. We therefore think that the evidence shows a binding contract by defendant to sell and convey, and shows no valid reason why he ought not to and cannot perform.

Order reversed.

Mechem, 70; *Story*, 39; *Peine v. Weber*, 47 Ill. 41; *Banner Co. v. Jenison*, 48 Mich. 459; *Selden v. Bank of Commerce*, 3 Minn. 166.

3

JOINT AGENTS, PRIVATE.

In a private agency when the authority is conferred on two or more they must jointly execute it.

ROLLINS *v.* PHELPS.

Supreme Court of Minnesota, 1861.

5 Minn. 463.

FLANDRAU, J. The paper-books furnished us in this case contain simply a copy of the contract on which the suit was founded. The pleadings are omitted as well as all the proceedings on the trial. It seems that the plaintiffs obtained a verdict against the defendants, the Court holding them personally liable upon the contract, and it is this ruling that they

to review, upon the ground that they acted as agents, and their principals alone incurred liability. We are necessarily confined in our examination to this one question, and that to the face of the contract alone.

The portion of the contract that is supposed to disclose the representative capacity in which the defendants acted is this: "Contract between Calvin Potter, party of the first part, and John Rollins, J. G. Rowe, Jonathan Chase, and Gilbert Hanson, as agents, authorized by the log-owners, parties of the second part." The substance of the contract is, that the first party agrees to raft certain logs in Vermillion Slough, and the second party agrees to pay him for it, and furnish him money and supplies while at work, etc. It also appears from the contract that the logs were marked with the several marks of the owners. The defendants sign the contract with their proper names, with the addition of "agent" to each name. The contract is not signed by Gilbert Hanson, and nothing appears to explain why his name is omitted.

The contract upon its face is that of the defendants, and the log-owners. First, because it is not disclosed who the owners are; and, second, it appears that the log-owners constituted four persons their agents to make the contract, and only three of them had joined in it.

In order to confine the credit to the principal, it is in general necessary that he should be known as the responsible person: "Wap's Paley's Agency, 370; 12 Ves. 352; 2 Kent's Com. 117." There is nothing in this contract that would lead the court to suppose that the party of the first part gave the credit to the log-owners, parties unknown to him, and who, if he could seek them out, might have been so numerous and so widely separated as to render the enforcement of his claims against them impracticable, while the whole tenor of the instrument indicates that the employment was a personal one, so understood between the parties. Although the parties of the second part describe themselves as the agents of the log-owners, they make all the promises contained in their contract of the contract in their own behalf, and not in the names

of their principals, and sign the same with their own names. We think the authorities are clear that in contracts of this character the addition of the word "agents" to their names, is a mere *descriptio personarum*, and the obligation is a personal one: *Taft v. Brewster*, 9 John. Rep. 334; *White v. Skinner*, 13 Ib. 307; *Stone v. Wood*, 7 Cowen, 453; *Barker v. Mechanics' Ins. Co.*, 3 Wend. 94.

The case of *Sanborn v. Neal et al.*, 4 Min. Rep. 126, involved the consideration of questions somewhat analogous to the one here presented; but in that case the instrument did disclose the name of the principal, and also, that the parties signing were public agents, and it was upon these features of the case that the signers were exonerated from personal liability.

It is a general rule that where a private agent so executes his authority as not to bind his principal, he will be himself liable for his acts: *Dunlap's Paley's Agency*, 386; *Dusenbury v. Ellis*, 3 John. Cas. 70; *Stone v. Wood*, 7 Cowen, 453; *Palmer v. Stephens*, 1 Denio, 371-480.

An authority conferred upon several agents must be executed by them all, and any act done by a less number will be void as against the principal.

"An authority given to two cannot be executed by one, though one die or refuse. If an authority be to A, B and C, to sell after the death of D, and one die before D, the others cannot sell. An authority to three jointly and separately is not well executed by two:" *Dunlap's Paley's Agency*, 177, and notes.

This rule is of general application to all matters of private concern, but does not extend to public affairs. In the case of public agents a majority may usually act: *Green v. Miller*, 6 John. Rep. 69.

As we have seen, the contract shows that the authority was conferred upon four and was executed by but three. Had it been properly executed in the names of the principals, it would have failed to bind them under such an execution; and when such fact is apparent, the party contracting with the

agents may resort to their personal liability in the first instance.

The defendants' counsel attempts to do away with the force of the objection that the principals were not disclosed, by the facts that the logs being marked, the plaintiff could resort to the books of the surveyor general, and there ascertain to whom the marks belonged. The law in force at the time of this contract on the subject of marks, was § 16, of chap. xvi, of the Laws of 1854. This section only makes it the duty of the surveyor general to keep a book for the record of marks, and to record such as are filed with him. These marks may or may not have been recorded, from anything that appears; but we are not willing to allow the force claimed for these marks, even had it appeared that they were duly recorded. A party is not obliged to follow up every channel of information to discover a principal, when contracting with parties who are willing to place themselves in the position of principals, as these defendants have done by their contract.

The order denying a new trial is affirmed.

Smith v. Glover, 50 Minn. 58; *Cedar Rapids R. R. Co. v. Stewart*, 25 Ia. 115; *Hawley v. Keeler*, 53 N. Y. 114; *Mechem*, 77; *Story*, 42; *Brennan v. Willson*, 71 N. Y. 502.

4

JOINT AGENTS, PUBLIC.

In a public agency the act of a majority is sufficient to execute the authority.

MARTIN *v.* LEMON.

Supreme Court of Errors of Connecticut, 1857.

26 Conn. 192.

STORRS, C. J. The third section of the Act to prevent and remove nuisances from highways, etc. (Rev. Stat. tit. xxxviii, § 3), provides, that "if any person, etc., shall take any part of a highway into his field or inclosure, or erect any fence

thereon in such manner that such highway is made narrower than before, the selectmen of the town in which the offense is committed, or a committee appointed by the town for that purpose, shall give notice to the person so offending to remove such fence or encroachment within a reasonable time not exceeding one month after such notice; and if such person shall neglect to remove it, then the selectmen or committee shall remove it, and may recover the expense of the removal from the person making such fence or encroachment." The plaintiff being one of a committee of three persons duly appointed under this section and acting without the concurrence or advice of any of the other members of the committee, after a notice by him to the defendant to remove an encroachment made by the latter on the highway, and his neglect to do so, removed it, and now claims of the defendant the expense of such removal.

His right to recover depends on the question whether he legally possessed the power which he thus exercised; and hence the inquiry is presented, whether, by the true construction of that section, the power of removing encroachments is given to each of the members of such committee consisting of several persons, acting separately, and without the concurrence of the other members or any of them. We are clearly of the opinion that that statute does not empower each of the members of the committee appointed under it so to act. There is no general legal principle that where, as in this case, an authority to do an act of a public nature is given by law to more persons than one, each of them independently of the others, and without the concurrence of them, or of some of them, may exercise that authority. On the contrary, the rule on this subject is, that in such a case, if the act is merely ministerial in its character, a majority at least must concur and unite in the performance of it; but they may act separately, and need not be convened in a body or notified so to convene for that purpose; but if the act is one which requires the exercise of discretion and judgment, in which case it is usually termed a judicial act, unless special provision is otherwise made, the per-

sons to whom the authority is given must meet and confer together and be present when the act is performed, in which case a majority of them may perform the act; or, after all of them have been notified to meet, a majority of them having met will constitute a quorum or sufficient number to perform the act, and according to some modern authorities, the act may be legally done by the direction or with the concurrence of a majority of the quorum so assembled: *Damon v. Granby*, 2 Pick. 345, 354.

These appear to be the principles of the common law on this subject: *Grindley v. Barker*, 1 Bos. & Pul. 229; *Keeler v. Frost*, 22 Barb. S. C. 400; *Perry v. Tynen*, Ib. 137.

The Courts in this State, however, have gone further, and held in a particular class of cases where the act requires the exercise of judgment and discretion, that a majority of the persons on whom the authority is conferred may perform it, and that they may act separately for that purpose, and need not act in a board or collective body: *Gallup v. Tracy*, 25 Conn. 10. There is no occasion in the present case for pursuing this particular subject further. There is nothing in the act now in question which takes it out of the operation of these principles, or provides that the authority conferred by it may be exercised by one only of the members of the committee mentioned in it. Its terms contain no express delegation to the individual members of the committee of the power given to the committee, nor do those terms imply that they may separately exercise that power. On the other hand, they import that one of them cannot so act where the committee consists of more than one person. They prescribe that the acts therein authorized shall be done by a "committee," and there is nothing to indicate that they may be done by a particular portion of the persons composing it. This term, when it is applicable, as it is in the present case, to more persons than one, is a collective word, or, as grammarians would say, a noun of multitude, and indicates a plurality of persons. The expression which is thus used in the Act is therefore not appropriate to express the idea that the power conferred on a com-

mittee may be exercised by each individual member of it separately. And, accordingly, as a reference to our statutes will abundantly show, wherever an authority is conferred by a statute on several persons, by whatever term they are designated, and it is intended that a particular portion of them may exercise that power, it is usual to insert some phrase which expresses such intention. We also infer from the magnitude of the power which is given by the Act in question to the committee of encroachments, and the serious consequences which might ensue to the persons on whom it is brought to bear, that it was the intention of the Legislature that it should not be exercised by one only of the members of the committee on his sole judgment and opinion, but that it was designed that its exercise should be the result of deliberation and consultation between them.

We therefore advise the Superior Court to render judgment for the defendant.

Woolsey *v.* Tompkins, 23 Wend. 324; First National Bank *v.* Mt. Tabor, 52 Vt. 87; McNeil *v.* Chamber of Commerce, 154 Mass. 277; Soens *v.* Racine, 10 Wis. 271; Walker *v.* Rogan, 1 Wis. 597; Mechem, 78.

E

CLASSES OF AGENTS.

1

GENERAL.

A general agent is one authorized to act for his principal in all matters connected with a specified transaction, business, or employment.

LOUDON SOCIETY *v.* HAGERSTOWN BANK.

Supreme Court of Pennsylvania, 1860.

36 Pa. St. 498.

WOODWARD, J. The Hagerstown Savings Bank brought this action of *assumpsit* against William McGrath and his numerous co-defendants, as partners trading and doing busi-

ness under the name and style of the Loudon Savings Fund Society. The first count in the plaintiff's *narr.* is founded upon a "certain writing obligatory, commonly called a certificate of deposit, for the sum of \$5,000, signed by H. Easton, treasurer of said Loudon Savings Fund Society (who had full power conferred upon him to do such act), and then and there delivered said certificate of deposit to said plaintiff, and thereby promised to pay said plaintiff said sum of \$5,000, six months after the date thereof, with interest at six per cent." The second count is upon a certificate for a deposit of like sum, made by H. Easton, and by him indorsed, but delivered by the defendants to the plaintiff. Then follow the common money counts.

The copy of the certificate of deposit shows that it was issued on the 1st January, 1857, by H. Easton, treasurer, to himself for \$5,000, payable to his order six months after date, with interest at six per cent., and by him indorsed in blank.

Besides all the general pleas, the defendants pleaded specially: 1st. That the said writing obligatory was not their act or deed. 2d. That Hezekiah Easton had no power or authority, as treasurer of the Loudon Association or otherwise, to sign or indorse the certificate, and that he issued it fraudulently and corruptly, without the knowledge or authority of the defendants, of all which the plaintiff had knowledge when the certificate came into their possession. 3d. That Hezekiah Easton was not treasurer of the Loudon Savings Fund Society when the said writing was made. 4th. That the defendants did not make said paper nor deliver the same to the plaintiff. 5th. That Easton did not deposit the \$5,000 mentioned in said certificate, but was largely indebted to said society. 6th. That the plaintiff is not a *bona fide* holder of said certificate for value. 7th. That the proceeds of said certificate did not go into the business of the defendants, but were appropriated by said Easton, and that the plaintiff knew such use of the funds was intended. By means of these numerous pleas, and the points submitted on the one side and the other, the case was presented in every possible aspect.

On the trial of the cause the learned Judge directed the jury to return a verdict for the amount of the plaintiffs' claim, and declined to submit any question of fact for their decision. To the admission of evidence, and the refusal of the Court to give instructions prayed for, sixteen errors are assigned, which I do not propose to consider in consecutive order, though all that is material in them shall be noticed.

It is apparent that the great question raised upon the record had reference to the character and extent of Easton's authority, as the agent of the defendants. The party who avails himself of the act of an agent must, in order to charge the principal, prove the authority under which the act is done. If the authority be created by power of attorney, or other writing, the instrument itself must in general be produced; and since the construction of writings belongs to the Court, and not to the jury, the fact and scope of the agency are, in such cases, questions of law, and are properly decided by the Judge. But the authority may be by parol, or it may be implied from the conduct of the employer in sanctioning the credit given to a person acting in his name. And in many cases, the acts of an agent, though not in conformity to his authority, may yet be binding upon his employer, who is left, in such cases, to seek his remedy against his agent. Whether an employer be or be not bound by such acts as are not conformable to the commission given by him, depends principally upon the authority being general or special. By a general agent is understood not merely a person substituted in the place of another, for transacting all manner of business, but a person whom a man puts in his place to transact all his business of a particular kind, as to buy and sell certain kinds of wares, to negotiate certain contracts and the like. An authority of this kind empowers the agent to bind his employer by all acts within the scope of his employment, and that power cannot be limited by any private order or restriction, not known to the party dealing with the agent. A special agent is one who is employed about one specific act, or certain specific acts only, and he does not bind his employer unless his authority be strictly

pursued : Paley on Agency, 199, *et seq.* "A general authority," said Lord ELLENBOROUGH, in *Whitehead v. Tuckett*, 15 East, 408, "does not import an unqualified one, but that which is derived from a multitude of instances ; whereas a particular authority is confined to an individual instance." And in all instances where the authority, whether general or special, is to be implied from the conduct of the principal, or where the medium of proof of agency is *per testes*, the jury are to judge of the credibility of witnesses, and of the implications to be made from their testimony.

As the plaintiff here did not produce any written evidence of Easton's agency, it was the duty of the Court to inform the jury what constitutes agency, express or implied, special or general, and to refer to them the questions (1st), whether the evidence satisfied them that Easton was either the general or special agent of the defendants? and (2d), whether the issuing of the certificate in suit was within the scope of his authority? 3 W. & S. 79; 11 Harris, 247; 6 Casey, 513; 7 Ib. 461.

Or, if it was not a case of strict agency, if Easton acted without any authority in issuing the certificate, or transcended such as had been delegated to him, the question of ratification by the defendants was also a mixed question of law and fact. What would in law amount to ratification, was for the Court; whether such proofs were found in the case, was for the jury. Such adoptive authority relates back to the time of the original transaction and is deemed, in law, the same to all purposes, as if it had been given before: *Lawrence v. Taylor*, 5 Hill, 107-113; and see *Livermore on Pr. and Agent*, vol. I, pp. 44-50; *Railroad Co. v. Cowell*, 4 Casey, 337.

The main argument of counsel in support of the Court's entire withdrawal of the case from the jury rests on the law of partnership. Easton was a partner in business with the defendants, the acting partner to whom the conduct of the business of the defendants had been almost wholly committed for a long time; and hence, it is correctly inferred that the saving fund society so accredited him to the world, as to bind

his copartners, by his dealings with innocent parties *within the scope of the business of the partnership*.

The authorities, as may be seen by consulting Gow, Story, Collyer or any other standard work on partnership, abundantly sustain the proposition, that each partner is, in contemplation of law, the *general agent* of the partnership. "When a partnership is formed for a particular purpose," said Chief Justice MARSHALL, in *Winship v. The Bank of the United States*, 5 Peters, 561, "it is understood to be, in itself, a grant of power to the acting members of the company to transact its business in the usual way. If that business be to buy and sell, then the individual buys and sells for the company, and every person with whom he trades in the way of its business has a right to consider him the company, whoever may compose it. The articles of copartnership are perhaps never published. They are rarely if ever seen, except by the partners themselves. The stipulations they may contain are to regulate the conduct and rights of the parties, as between themselves. The trading world, with whom the company is in perpetual intercourse cannot individually examine these articles, but must trust to the general powers contained in all partnerships. The acting partners are identified with the company and have power to conduct its usual business in the usual way."

These observations were made in a case where the several defendants were engaged in the soap and candle business, and they were all held liable on notes indorsed by Winship in the firm name, notwithstanding the restrictions imposed on him by the articles under which he was acting, and notwithstanding the money, or some of it, was misapplied to his own purposes. This case is a strong illustration of the commercial principles which permeate the contract of partnership. In strictness it is applicable only to commercial transactions.

The general principles stated by the Chief Justice in the same case are applicable to all partnerships, whether commercial or not in their pursuits. He said: "No man can be pledged but by himself. If he is to be bound by another, that other must derive authority from him. The power of an agent

is limited by the authority given him; and if he transcends that authority the act cannot affect his principal; he acts no longer as agent. The same principle applies to partners. One binds the others so far only as he is the agent of the others."

Now it is material to observe that, in the case in hand, the learned Judge withdrew the facts from the jury, on the assumption that Easton's act was within the scope of the business of the partnership of which he was a member; that he was conducting "its usual business in the usual way." And the argument of the learned counsel rests on the same assumption.

On a review of the evidence the Court holds that the matter of the scope of the partnership business should have been submitted to the jury.

Judgment reversed and a *venire facias de novo* awarded.

Hatch v. Taylor, 10 N. H. 538; *Bryant v. Moore*, 26 Me. 84; *Butler v. Maples*, 9 Wall. 766; *Mechem*, 6; *Story*, 17, 18.

2

SPECIAL.

A special agent is one whose authority is limited to a particular transaction or series of transactions.

LADD v. FRANKLIN.

Supreme Court of Errors of Connecticut, 1870.

37 Conn. 53.

PHELPS, J. To determine this case let us briefly recur to the facts. The defendant, on the 26th day of July, 1862, in legal meeting, voted to pay \$50 from its treasury to such resident volunteers as should thereafter, before the 1st day of September following, enlist in the service of the United States, and also to those who had previously enlisted since the 14th day of the said July; such bounty to be paid when such recruits should be mustered into the United States service and accredited to

the town; and the selectmen were appointed a committee to pay to the volunteer or his order such bounty when the foregoing conditions were complied with, and were authorized to borrow money, if necessary, to pay the same.

At another meeting duly warned and legally held on the 23d of August, 1862, it also voted to pay each resident volunteer from the town who should enlist for the term of nine months before the first day of said September, \$150 in addition to the \$50 previously offered, and the selectmen were directed to pay this bounty "on and after such volunteers were mustered into the service of the United States;" and they were required to use the utmost diligence in filling the quota then assigned to the town.

Pursuant to the votes passed at the last-mentioned meeting Ezra B. Bailey, a resident of the town of Franklin, on or about the 5th of September, 1862, volunteered for nine months, and was examined, accepted, and sworn on the 25th of that month, but in consequence of sickness *was never mustered into the United States service and never accredited to or applied upon the quota of the town.* The regiment in which he volunteered was duly mustered into service on the 10th of the subsequent November. The note in suit was dated on the 26th of September, and the consideration expressed on its face is for "nine months volunteer militia service." It is in form negotiable, but was made so by one of the selectmen after the others had signed it, and in their absence and without their knowledge or authority or that of the town, but the fact of such alteration was subsequently communicated by the person by whom it was made to the other selectmen, who made no objection. On the same day the selectmen paid Bailey \$35 in money, which, together with the note, made the entire sum voted by the town at their meeting on the 23d of August. Between February 1 and October 1, 1863, the plaintiff purchased the note from Bailey, and paid him therefor its full value. The plaintiff then had knowledge of all the facts in relation to Bailey's service, excepting that he did not know he had not been duly mustered into the United States service. He had heard that the select-

men questioned the liability of the town to pay the note, but had no actual knowledge that they declined payment until he saw a published notice to that effect dated October 12, 1863, which cautioned all persons against purchasing the note, and stated that payment of it had been stopped because the service by Bailey, specified as the consideration for the note, had not been performed. The Court found that neither Bailey nor the plaintiff knew that the former had not been applied toward the quota of the town, unless such knowledge is properly inferable from the time and manner of Bailey's service; and that the plaintiff took the note in good faith excepting as the contrary is indicated by the other acts found. It is conceded that the plaintiff was a resident of the town of Franklin at the time of the passage of the votes, and had knowledge of them.

In view of the character of the votes, and of the facts found and admitted, and the law as applicable to them, we are to say whether the Superior Court properly found the issue in favor of the plaintiff.

It is claimed in support of the motion for a new trial, that the selectmen were the special agents of the town, and exceeded their authority in giving the note in suit. We think a fair construction of the votes passed by the defendant justifies this claim. They were appointed and authorized to execute the single and specific purpose of filling the then pending quota of the town, and of paying the volunteers when they should be mustered into the service of the United States. So far as the authority to make payment was concerned it was carefully and expressly limited as to the time when it might be performed.

New trial should be granted.

LOOMIS, J. We prefer to rest the decision of this case upon the ordinary principles of agency, without discussing other questions suggested in the argument.

In order to recover, it must appear that the note in suit was the note of the town of Franklin. To make it the note of the

town the selectmen who executed it must have had sufficient authority from the town. In giving the note the selectmen were not acting under any general powers conferred on them as selectmen, nor under any power to borrow money, but as special agents in this particular matter, pursuant to special instructions contained in the recorded votes of the town; and by those votes it appears that authority was given to pay the bounty only when the soldier should be mustered into the United States service and accredited to the town; and as Bailey never was so mustered into service or accredited to the town, no payment of the bounty by promissory note, or otherwise, could be lawfully made. The note, therefore, cannot be the note of the town in the hands of Bailey, the immediate party to the transaction. But is it to be regarded as the note of the town in the hands of the plaintiff, who was a purchaser for value before the note became due? We think not. The plaintiff had no right to presume that the note in suit was given by the selectmen, either under their general powers as selectmen (if their general powers were sufficient, which is doubtful), or under the special power given by the vote of the town to borrow money to pay the bounties, because it appears upon the face of the note that it was upon consideration of "nine months volunteer militia service," and it was clear that the selectmen could have given the note only under some special authority, and, as such special authority could be given only by a recorded vote of the town, the plaintiff stands fully notified of such vote and of its terms. Such knowledge on the part of the plaintiff may not only be fairly inferred from the facts found by the Court, but was distinctly admitted in the brief of the plaintiff's counsel.

The record also shows that the plaintiff knew that the selectmen had questioned the liability of the town on the note. If therefore the plaintiff, when he purchased the note, had full knowledge of the limitation of authority in the selectmen, contained in the votes of the town, and that the liability of the town had been called in question, upon what principle can he claim that the authority of the selectmen to bind the town

should be extended in his favor beyond the terms of those votes? In certain exceptional cases the liability of the principal for the act of the agent may be extended in favor of innocent third parties beyond the authority actually given, but this applies only when the third party is ignorant that restrictions have been imposed on the agent, and when there is an appearance of authority, for which the principal is responsible, which operates to mislead the party so dealing with the agent; but in the case now under consideration the votes of the town show the exact authority given, and they are so explicit that there is no room for enlargement by appearances.

It was claimed in the argument for the plaintiff that the act of the selectmen in giving the note was an admission binding upon the town that the soldier, to whom the note was made payable, had been mustered into service, and the case of *Commissioners of Knox County v. Aspinwall*, 21 Howard, 539, was cited in support of this claim. A careful comparison of that case with this we think will show that they are not analogous in principle. The case cited was a suit against the Commissioners of Knox County in the State of Indiana, to recover, in favor of innocent holders, the amount due upon certain coupons, originally attached to bonds issued by the board of commissioners, payable to the Ohio & Mississippi Railroad Company, or bearer, at the North River Bank, New York. An Act of the Legislature directed the board to subscribe to the stock of the railroad company, and to issue bonds for the payment of the subscriptions, in the event that at an election to be held at a certain time in the county, pursuant to notice to be given by the sheriff of the county, a majority of the votes should be cast in favor of such subscription.

The defense was that the defendants, the board of commissioners, possessed no authority to execute the bonds or coupons in question, in consequence of an alleged omission, on the part of the sheriff, in respect to the notices to be given of the election at which a vote was to be taken for or against a subscription to the stock of the railroad company and the issue of bonds to pay for the same.

The chief inquiry was, whether the bonds and coupons in question were executed and put in circulation by competent and legal authority ; and this question depended upon another, namely, who was to determine whether or not the election had been properly held, and a majority of the votes of the county cast in favor of the subscription ?

Palmer v. Cheney, 35 Iowa, 281 ; *Story*, 17-22 ; *Mechem*, 6 ; *Wharton*, 119, 124.

F

APPOINTMENT.

Except in the case of an agency created by operation of law, one can become the agent of another only by the will of the principal.

GRAVES v. HORTON.

Supreme Court of Minnesota, 1887.

38 Minn. 66.

MITCHELL, J. This action was brought to recover the value of certain property, which plaintiff had exchanged with defendant for a skating rink, skates, boats, etc., situated at Spirit Lake, Iowa. Plaintiff's claim is that there was an entire failure of title to this property, because defendant had previously sold it to one McCurdy. It is not claimed that defendant had personally sold it to McCurdy, whatever was done in that regard having been done by one F. M. Horton, assuming to act as her agent. Hence, unless F. M. Horton had authority as defendant's agent to sell to McCurdy, there could have been no such sale, and plaintiff has no cause of action. The burden was on plaintiff to prove such agency.

It is axiomatic in the law of agency that no one can become the agent of another except by the will of the principal, either expressed or implied from particular circumstances ; that an agent cannot create in himself an authority to do a particular act by its performance, and that the authority of an agent cannot be proved by his own statement that he is such. Apply-

ing these elementary principles, and stripping the evidence of all that is immaterial or incompetent, and giving to what remains all the force that can be claimed for it, all there is that was brought home to the defendant tending to prove any such agency is that, when F. M. Horton was in Spirit Lake, he transmitted and submitted to her in Minneapolis what purported to be a proposition from McCurdy to give for this property \$1,090 in goods, and assume a mortgage on it for \$385, and that she agreed to accept this proposition ; that, McCurdy being unable to carry this out, F. M. Horton submitted to her another proposition, as coming from McCurdy, viz., to give in place of the goods eighty acres of land in Iowa ; that defendant declined to accept this last proposition, and so notified McCurdy ; that about two weeks after this she authorized F. M. Horton to negotiate the sale of this property to plaintiff on the terms which were finally agreed on, she herself making the transfer by executing the bill of sale described in the complaint. We have, on the other hand, the flat denials of both defendant and F. M. Horton, that he ever had any authority from her to sell this property or ever was her agent for this or any other purpose.

This is really all the competent evidence there is at all bearing upon this question of agency. The acceptance of McCurdy's first proposition, which he was unable to carry out, certainly does not tend to prove authority to F. M. Horton to sell on the terms of the second, which defendant expressly declined to accept ; and if any sale ever was made to McCurdy it was on the basis of this last proposition. Hence, the evidence of agency is reduced down to the fact that defendant authorized F. M. Horton to negotiate the sale to plaintiff, which she herself consummated by the execution of a bill of sale. It certainly cannot be that this is sufficient. It is true that agency may be proved from the habit and course of dealing between the parties ; that is, if one has usually or frequently employed another to do certain acts for him, or has usually ratified such acts when done by him, such person becomes his implied agent to do *such acts* ; as, for example, the case of the

manager of a plantation in buying supplies for it, or the superintendent of a saw-mill in making contracts for putting in logs for the use of the mill, which are the cases cited by respondent. It is also true, as was said in *Wilcox v. Chicago, Mil. & St. Paul R. R. Co.*, 24 Minn. 269 (which involved the question of the authority of the person to whom goods were delivered to receive them), that a single act of an assumed agent, and a single recognition of it, may be of so unequivocal and of so positive and comprehensive a character as to place the authority of the agent to do *similar* acts for the principal beyond question. It is also true that the performance of subsequent as well as prior acts, authorized or ratified by the principal, may be evidence of agency, where the acts are of a similar kind, and related to a continuous series of acts embracing the time of the act in controversy, as indicating a general habit and course of dealing; as, for example, the acts of a president of a railway company in making drafts in the name of the company, which were honored by it, which was the case of *Olcott v. Tioga R. R. Co.*, 27 N. Y. 546, cited by counsel. But we think the books will be searched in vain for a case where it was ever held that authority to negotiate for the sale of property to one person at one time on certain terms, the transfer to be made by the principal in person, was evidence of authority to sell and transfer the same property at some former time to another person on different terms.

There are some facts about this case that would naturally incline the sympathies of a jury toward plaintiff. He has so far got nothing for the property which he gave to defendant. The conduct of F. M. Horton was not calculated to commend itself to their favor, as he admits obtaining and retaining a conveyance to his wife of the very land which McCurdy proposed to give to defendant in exchange for this property. But we do not see how, upon legal principles, the verdict can be sustained under the present state of the evidence.

A new trial would, however, have to be granted on the ground of error in the admission of evidence. The general statement of the witness McCurdy that Frank M. Horton did

quite an extensive business at Spirit Lake trading in real estate, and frequently bought and sold in the name of Jennie L. Horton and Carolina W. Horton, without identifying the transactions, or describing them, or in any way bringing them home to the notice or knowledge of defendant, was inadmissible to prove agency. The Court also erred in allowing the same witness to testify that F. M. Horton was publicly and generally known at Spirit Lake as the agent of Jennie L. Horton. Agency cannot be proved by general reputation.

Judgment reversed, and new trial ordered.

Johnson v. Hurley, 115 Mo. 513; *London Society v. Hagerstown Bank*, 36 Pa. St. 498; *Mechem*, 80; *Story*, 47.

G

RATIFICATION.

1

DEFINED.

Ratification is express or implied approval, whereby force and effect is given to a previously unauthorized act.

STATE OF WISCONSIN *v.* TORINUS.

Supreme Court of Minnesota, 1879.

26 Minn. 1.

THE State of Wisconsin brought this action, in the District Court for Washington County, as indorsee of a promissory note made by defendant to the order of one Harriman. The averments of the complaint are, in substance, as follows:

On March 3, 1869, the Legislature of Wisconsin passed an Act authorizing the Governor to appoint one or more agents whose duty it should be to preserve and protect the timber growing on the lands theretofore granted by Congress to the State to aid in the construction of railroads, and to seize, in the name and on behalf of the State, all logs and timber that

should be cut or carried away from such lands without lawful authority, and to sell the same at public auction to the highest bidder for cash, the money to be immediately paid into the State treasury. From May, 1869, until 1874, Harriman was the duly appointed agent of the plaintiff, under this Act, and in the summer of 1873 he seized a large quantity of pine saw logs, which the defendants, during the previous winter, had wrongfully cut on certain of the lands described in the Act and belonging to plaintiff, and had driven to the St. Croix boom. The logs thus seized Harriman advertised for sale at public auction, for cash, to the highest bidder, and at the sale, on July 25, 1873, they were struck off and delivered to the defendants, who at once converted them to their own use, and have never paid the plaintiff anything therefor.

On December 23, 1873, the defendants, in consideration of such sale and delivery, made the note in suit, whereby they promised to pay to Harriman or order \$8,799.66, on May 1, 1874, with interest at ten per cent. per annum, which note, before maturity, was indorsed and delivered by Harriman to the plaintiff.

On February 15, 1878, the Legislature of Wisconsin passed an Act expressly ratifying and confirming the sale made by Harriman to the defendants, and the note taken by him on account thereof, and making the same valid from the beginning as fully as if he had always had full authority to sell on credit and to take the note. Immediately after the passage of this Act the present suit was brought.

A general demurrer to the complaint was overruled by BRILL, J., acting for the Judge of the first district, and the defendants appealed.

In a former suit between the same parties, on the same note, prior to the Act of 1878, the defendants had judgment on the ground that, as Harriman had no authority to sell except for cash, the sale made by him was unauthorized and void, and the note, having no other consideration than the sale, was also null and void, and that the sale could be ratified and made good, only by Act of the Legislature of Wisconsin.

CORNELL, J. In a former action between these parties, the question was presented to this Court, on appeal therein, as to the validity of the note in controversy in this action. Upon the facts therein stated, it was held invalid for want of consideration, for the reason that it was given solely upon an unauthorized sale of logs from plaintiff to defendants, made by an agent of the former, by which no title or interest whatever in the property was transferred: 24 Minn. 332. Since then, and before the commencement of this action, the State, by legislative enactment, has duly and fully ratified and adopted the act of its agent Harriman in making the sale and taking the note, and the question now before us relates to the legal effect of this ratification. It is objected that it is ineffective for any purpose, because a contract void as prohibited by statute cannot be made good by a subsequent statute. While this is true as to acts and contracts made absolutely void and prohibited by law because of their illegal character, and as being *contra bonos mores*, the rule has no application to the facts of this case. Giving credit on the sale of logs, or taking notes in payment, is not prohibited by any law or statute. The act of Harriman as the agent of the State in giving credit to the defendants on the sale of his principal's property to them, though unauthorized and impliedly prohibited by the statute which gave him his authority, was not in itself an act of a wrongful or immoral nature, or tainted with any vice of illegality of that character, nor was it prohibited as such by any statute. The statute under which he acted was not directed to that end. It was rather in the nature of a power of attorney, which conferred upon the agents of the State a specific and limited authority in reference to certain matters, and which defined particularly the extent of such authority. In making the sale of his principal's property on time, and taking a note for the purchase-money, the agent, Harriman, exceeded his delegated authority, and, for that reason alone, his act was an invalid one. It was competent, however, for the State as principal to make it good by a legislative enactment, adopting it as its own; for it could have authorized it in the first instance, and whatever it

can do or direct to be done originally it can subsequently, and, when done, lawfully ratify and adopt, with the same effect as though it had been properly done under a previous authority. That the State might, through its Legislature, in the absence of any prohibition in its fundamental law, have authorized Harriman as its agent, in the first place, to make the very sale he did admits of no doubt. The proprietary rights of a State are as absolute and unqualified as those of an individual. It may, in the absence of any self-imposed restrictions in its Constitution, sell and dispose of its property upon its own terms and conditions, for cash or upon credit; and it may also take, hold, and enforce notes and obligations received from the purchasers of its property the same as individuals can. But as the legislative department is the only one that represents the State in respect to such rights, it alone can exercise the power necessary to the enjoyment and protection of those rights, by the enactment of statutes for that purpose. In the case before us, the State has duly ratified the acts of its agent in making the sale to the defendants, so that the title to the property which they purchased, the possession of which they still hold, has become perfect, and they cannot longer object that the note they gave is without consideration.

In respect to the other point suggested by the defendants, in respect to the character of the plaintiff's title to the property which it sold to the defendants, it is fully answered by the case of *Schulenberg v. Harriman*, 21 Wall. 44, where it was held that the legal title of the State to the lands from which the logs in question were taken was an absolute one, and that a stranger to the grant under which the State holds its title cannot raise any question upon the non-performance of any of the subsequent conditions contained in such grant. The same doctrine is also explicitly held in *Baker v. Gee*, 1 Wall. 333.

Order affirmed.

Mechem, 110; *Flynn v. Des Moines & St. Louis R. R. Co.*, 63 Ia. 490; *Goss v. Stevens*, 32 Minn. 472; *Rogers v. Kneeland*, 10 Wend. 218; *U. S. Express Co. v. Rawson*, 106 Ind. 215; *Drakely v. Gregg*, 8 Wall. 242; *Taymouth v. Koehler*, 35 Mich. 22; *Marsh v. Fulton Co.*, 10 Wall. 676; *Mechem*, 110.

2

WHAT MAY BE RATIFIED.

Only Voidable Acts.

Only voidable acts of the agent can be ratified.

SANFORD v. JOHNSON.

Supreme Court of Minnesota, 1877.

24 Minn. 172.

BERRY, J. Section 4, of chapter 56, Laws of 1869, enacts that no power of attorney or other authority from a wife to her husband, "to convey real estate, or any interest therein," shall be of any force. The word "interest" embraces the estate of a lessee, which is quite commonly denominated a leasehold interest. This meaning of the word is also distinctly recognized in § 10, c. 41, Gen. St., which provides that "no estate or interest in lands other than leases, for a term not exceeding one year," shall be created, etc. The word convey is evidently used as comprehending the word "lease," just as the word "conveyance" is used in §§ 18 and 22, c. 41, Gen. St., as comprehending leases.

From this construction of the statute it follows that a husband cannot, as his wife's attorney or agent, make a valid lease of her real property. Hence, it further follows that the lease attempted to be made by David Sanford (the plaintiff's husband), and upon which the cause of action set up in the complaint is founded, is absolutely void, and therefore no action can be maintained upon it as such lease. It is claimed, however, that the evidence shows that the plaintiff ratified the action of her husband, and adopted it as her own. The lease attempted to be made by David Sanford being absolutely void by the statute, it was incapable of ratification in any legitimate sense. Its provisions might be adopted by the plaintiff in a lease to be made by her, but not otherwise. This might be done by parol, except as respected the term. As this exceeded one year, the provisions with regard to it could be

adopted by the plaintiff only by writing: Gen. St., c. 41, § 10. Although there was evidence in the case tending to establish a parol lease by plaintiff to defendant, there was no evidence of any writing made by her in the premises, nor any evidence that the term of defendant's tenancy was in any way attempted to be fixed by her, except by her ineffectual adoption of the term prescribed in the void lease made by her husband. Assuming, then, the fact of the making of a parol lease by the plaintiff, the result is that, as no term was fixed by it, the defendant became plaintiff's tenant at will; that he was liable to her for rent as such tenant at will, and that he was authorized to terminate his tenancy by proceeding as directed in § 21, c. 75, Gen. St.: *Huyser v. Chase*, 13 Mich. 98.

But the present action is not founded upon any alleged liability of the defendant as such tenant at will, but solely upon the void lease made by the plaintiff's husband; and since, as we have already determined, no action can be maintained upon the void lease, it follows that the defendant's motion for a dismissal of the action should have been granted; and it further follows that the conclusion of law found by the Court below, to the effect that the plaintiff was entitled to recover, is erroneous. The judgment is accordingly reversed.

Henry v. Heeb, 114 Ind. 275; *Whitney v. Dutch*, 14 Mass. 457; *Day v. McAllister*, 15 Gray, 433; *Story*, 240; *Mechem*, 114.

Torts.

The agent's unauthorized tort may be ratified by the principal.

MOREHOUSE *v.* NORTHROP.

Supreme Court of Errors of Connecticut, 1866.

33 Conn. 380.

ACTION on the case against Gad G. Northrop and John J. Stillson, the declaration containing two counts. In the first it was alleged "that at the town of New Milford, on the 3d day of May, 1862, at the special instance and request of the

defendants, they, the plaintiffs, bargained with the defendants to buy of them a large number of hogs, to wit, one hundred and forty-three hogs, which said hogs belonged to the said defendants jointly, at the price of \$536.25; and the defendants then and there, by falsely and fraudulently warranting the said hogs to be sound and in a healthy condition, and free from all diseases and distempers whatsoever, then and there sold the said hogs to the plaintiffs, for and in consideration of the sum aforesaid, then and there paid by the plaintiffs to the defendants for the same. Nevertheless, the plaintiffs say that the said hogs, at the time of the said sale and warranty thereof, were in an unsound and unhealthy condition, and were badly diseased and distempered, so that they lost a large number of the said hogs, to wit, one hundred, which said last-mentioned hogs died by reason of being so as aforesaid diseased and distempered at the time of said sale to the plaintiffs. And so the plaintiffs say that the defendants, on the day and year last aforesaid, at New Milford aforesaid, deceived them, the plaintiffs, in the said sale of said hogs, to the great damage of the plaintiffs."

In the second count it was further alleged that, "at the same place and time, at the special instance and request of the defendants, they, the plaintiffs, bargained with the defendants to buy of them a great number of other hogs, to wit, one hundred and forty-three other hogs, belonging to the defendants jointly, at the price of \$536.25, to be paid as follows, to wit, by the note of the said Seymour Morehouse, dated May 3, 1862, payable sixty days from its date, to the order of the said Silas H. Hill, at the Bank of Litchfield County, for said sum of \$536.25, for value received, indorsed by the said Silas H. Hill; which note was then and there made, executed, indorsed, and delivered to the defendants; and the defendants then and there by falsely and fraudulently warranting, affirming, and declaring that said last-mentioned hogs were sound and in no wise sick, diseased, or distempered, did then and there sell said last-mentioned hogs to the plaintiffs, for and in consideration of the price last

aforesaid, then and there paid by the plaintiffs to the defendants for the same, in the manner last aforesaid; nevertheless, the plaintiffs say that at the time of said last-mentioned sale, said last-mentioned hogs were not sound, but were sick, diseased, and distempered, which was then and there well known to the defendants; but the defendants, intending to cheat and defraud the plaintiffs, concealed the same from the plaintiffs, and the plaintiffs were wholly ignorant thereof, and a great number of said last-mentioned hogs, to wit, one hundred, became and were so greatly diseased and distempered that they died; and so the plaintiffs wholly lost the same, to their great damage."

Damages were laid at the sum of \$700. The general issue was pleaded, with notice of special matter to be given in evidence.

On the trial to the jury, before PARDEE, J., the plaintiffs offered evidence to prove that the defendant Northrop, at the time of the sale of the hogs and as part of the negotiation which resulted in the sale, declared to the plaintiffs that the hogs "were raised just across the Hudson River, in the counties next back of Newburg," in the State of New York. They also offered evidence to prove that the hogs were raised in the State of Ohio, and had been brought from thence by railroad and river transports to Newburg, where the defendants bought them; that these facts were known to the defendants at the time of the sale; and that hogs raised in Ohio and transported thence in the manner above described, were liable thereby to contract diseases and become unsound, and were more likely to be unhealthy and unsound than hogs raised in the counties about Newburg. The defendants objected to the admission in evidence of the above declaration of Northrop, but the Court permitted the whole of the negotiations connected with the sale to go to the jury, charging them that this declaration was not admitted as a substantive ground of recovery, but that they might consider it, in connection with the other evidence above detailed, in reference to the question whether, if their verdict should be for the plaintiffs, it should include any, and if any, what amount of exemplary damages.

The plaintiffs also offered in evidence a note, corresponding to that described in the second count of their declaration, together with proof that the note was duly executed and delivered, in payment for the hogs, immediately upon the completion and in accordance with the terms of the contract of sale, that the defendants subsequently had it discounted at a bank for their benefit, and that it was duly paid at maturity. To the admission of the note and the accompanying evidence the defendants objected, on the ground of variance, and also because it was not alleged in the declaration that the note had been paid, but the Court admitted all the evidence thus offered.

It was admitted that the defendants, at Newburg, became the joint owners of the hogs, in equal shares, and so continued until their sale to the plaintiffs; that at Pawling, in the State of New York, the hogs were taken by Northrop into his possession and under his control, in pursuance of an arrangement there made between Stillson and himself, for the express purpose of effecting a sale of them for the joint and equal benefit of both owners; and that Northrop afterward, in the absence of Stillson, sold the hogs at New Milford to the plaintiffs, at a profit, which was equally divided between the defendants.

The plaintiffs also offered evidence to prove that Northrop, at the time of the sale, and as one of its terms and conditions, made the warranty, and the affirmations and representations described in their declaration, and that the same were false and fraudulent, and well known to him at the time to be untrue.

The defendants requested the Court to charge the jury,

1. That the plaintiffs could not recover as against either of the defendants, and particularly against Stillson, without proving a joint contract, as alleged in the declaration.

2. That the plaintiffs could not recover for any fraud set up in the declaration unless it was a joint fraud; that at any rate Northrop, through a part owner with Stillson, could not bind Stillson by any fraudulent representations to

which Stillson was not a party and of which he had no knowledge.

3. That the plaintiffs' declaration in both counts is an action upon a contract of warranty, and that proof of fraud without proof of the warranty was not sufficient to entitle the plaintiffs to recover in this form of action.

4. That the evidence that Northrop represented that the hogs were raised in the counties near Newburg, in the State of New York, was not admissible as against either defendant, as no such fraudulent representation was declared upon in the declaration.

The Court did not so charge the jury, but charged them that, if they believed from the evidence that at the time of the sale the defendant Northrop did, in the absence of the defendant Stillson, falsely and fraudulently warrant the hogs to the plaintiffs to be sound and free from all disease, and that the plaintiffs had suffered damage thereby, or if, from the evidence, they believed that Northrop at the time of the sale, in the absence of Stillson, made a false and deceitful representation to the plaintiffs, that the hogs were sound and in no wise sick, diseased, or distempered, with the design and for the purpose of inducing the plaintiffs to purchase the hogs, knowing or believing such representation to be untrue, and that the plaintiffs were induced to make, and did make, such purchase by reason of such false and deceitful representations, and had suffered damage thereby, they might render a verdict against both defendants; otherwise their verdict should be for the defendants.

The jury returned a verdict for the plaintiffs to recover \$323 damages; and the defendants moved for a new trial, on account of the admission of the evidence objected to, and of the refusal of the Court to charge as requested.

CARPENTER, J. The plaintiffs had their election to bring their action in assumpsit or tort. They chose the latter. The declaration contains two counts; the first is for a false warranty, the second is for a false warranty and also for a

fraud in the sale of the hogs. Whether this count would have stood the test of a special demurrer, it is not now necessary to inquire. It is in form and substance a count for fraud, and with the exception of the word warranting, is in the usual form. We think it was so intended by the pleader, and as such was properly joined with a count for false warranty: *Humiston v. Smith*, 22 Conn. 19.

The other questions arising upon the record will be considered in their order.

1. The defendants objected to the evidence offered to prove the declaration of Northrop, made during the negotiations which resulted in the sale, that the hogs in question "*were raised just across the Hudson River, in the counties next back of Newburg*" in the State of New York.

The view we have taken of the nature of this action relieves this question of all difficulty. Under the second count the plaintiffs must not only prove the false representations, but must also prove that the defendant Northrop knew them to be false. This evidence was offered as tending to prove the *scienter*, and as affecting the question of damages. For this purpose we think the evidence was properly admitted.

If it be notoriously true, as the plaintiffs claimed, that hogs raised in that locality were much more likely to be sound and free from disease than those transported from the West, the motive of Northrop in making the declaration is apparent. He could have had no other object, assuming the declaration to be untrue, than to mislead and deceive the plaintiffs in respect to the soundness of the hogs. He had declared them to be sound and free from disease; and then to allay all suspicion and induce the plaintiffs to believe this representation, he adds that they were raised just back of Newburg. It was an artifice well calculated to deceive the plaintiffs, and from it, in connection with the other proof, the jury might well infer that they were deceived, and that it was done willfully.

2. The note described in the second count, and the evidence that it was delivered to the defendants in payment, re-

ceived and negotiated by them, and paid by the plaintiffs when due, were objected to as inadmissible ; but the Court overruled the objection. The ground of the objection was that there was no allegation that the note had been paid, and because it was a variance from the allegations in the declaration. The latter objection is not insisted on. The note is correctly described, and it is alleged that the hogs were to be paid for by the note, and that it was delivered to the defendants at the time of sale. These allegations are pertinent to the plaintiffs' case and may be proved whether the declaration is sufficient or otherwise: *Adams v. Way*, 32 Conn. 160. The insufficiency of the declaration cannot be taken advantage of by way of objection to evidence offered in support of the averments in the declaration. Thus far then the evidence offered, was admissible ; and if the rest were inadmissible we should refuse to grant a new trial, for the reason that the defendants do not discriminate between admissible and inadmissible testimony and confine their objections to the latter : *Reg. Gen.* 18 Conn. 574; *Fitch v. Woodruff & Beach Iron Works*, 29 Conn. 82; *State v. Alford*, 31 Conn. 40.

But we are of the opinion that all the evidence was strictly admissible. The first count alleges payment without specifying how it was made. This allegation may be proved, either by proof of payment in money or of payment in some other thing which the defendants received and accepted *as money* ; such as bank checks, bills of exchange, promissory notes or the like. All the evidence objected to tended to prove this averment, and from this evidence alone the jury would have been justified in finding it true.

In respect to the second count, it was unnecessary for the plaintiffs to aver or prove the negotiation or payment of the note in order to maintain their action. The consideration of the contract was the note, and when that was delivered the contract was complete, and the plaintiffs had a right of action immediately. They were not bound to wait for the note to mature, but might sue at once, and while the note was in the defendants' hands. This part of the evidence

therefore was not essential to the plaintiffs' right of recovery. But we are of the opinion that it was admissible nevertheless. It proved the value of the consideration, and that it was not a mere technical one. That fact might well be considered by the jury in estimating damages.

3. The last objection respects the charge of the Court to the jury. The defendants were joint owners of the property in question. They made an arrangement by which Northrop took it into his keeping, and under his control and management, for the purpose of effecting a sale thereof, for the equal and joint profit and benefit of the owners. Northrop in the absence of Stillson sold the hogs at a profit which was equally divided between them. The case does not show that Stillson, after the circumstances of the warranty and fraud came to his knowledge, ever repudiated the contract, or offered to restore any part of the consideration; but on the contrary he still insists upon retaining his portion of the profits. Under these circumstances the jury were told, in substance, that if, in the contract of sale, there was a false warranty or fraud, whereby the plaintiffs had sustained damage, both defendants were liable. We see no objection to this charge.

Northrop was expressly authorized to sell. In doing so, as the jury must have found, he falsely warranted the property sold, or was guilty of fraud. Stillson by his subsequent conduct ratified the contract, not in part but *in toto*, including the warranty and deceit. He was therefore a party to the contract. He shared in the profits, and must not now complain that he is required to share in the responsibility. By the ratification of the acts of an agent, in tort as well as in contract, a liability is incurred by the principal: Parsons on Contracts, 51, 52, and cases there cited.

If the defendants are to be regarded as partners in this transaction their liability will be the same. That all the members of a firm are answerable for a false warranty made by one of the members, in a sale of partnership property, within the scope of his authority, is too clear for argument. They are equally liable for a fraud under the same circum-

stances, especially where they share in the profits: *Locke v. Stearns*, 1 Met. 560.

We do not advise a new trial.

Tucker v. Jerris, 75 Me. 184; *Griswold v. Haven*, 25 N. Y. 595; *Story*, 239; *Mechem*, 113.

Forgery.

The weight of opinion seems to be to the effect that a forgery can be ratified.

WELLINGTON v. JACKSON.

Supreme Judicial Court of Massachusetts, 1876.

121 Mass. 157.

CONTRACT against the maker of a promissory note. Answer, a denial that the defendant made the note.

After the commencement of the action the defendant filed his petition in the Court of Bankruptcy and obtained his discharge which was filed in the case. His assignee obtained leave to come in and defend, and the plaintiffs prosecuted the action for the purpose of obtaining judgment and execution against the property of the defendant attached in the action, and the assignee defended on behalf of the creditors. Trial in the Superior Court, before PUTNAM, J., who allowed a bill of exceptions in substance as follows:

There was evidence tending to show that on May 1, 1875, and before the defendant went into bankruptcy, the note, having been protested for non-payment, was presented to him, and he examined it, and said it should be arranged the following Monday. The plaintiffs also offered in evidence copies of the proceedings in bankruptcy, from which it appeared that the note in suit was contained and described in the schedule of the creditors of Jackson, signed and sworn to by him. This evidence was objected to on the ground that it was not admissible as against the defendant's assignee; but the Judge admitted it and the defendant excepted.

The plaintiffs contended, among other things, that if the jury were not satisfied upon the evidence that the defendant actually signed the note, yet that, by his conduct in reference to it, he was estopped from denying his signature.

The presiding Judge instructed the jury as follows: "If, upon the whole evidence in the case, the jury shall be satisfied that the defendant, knowing that his signature was forged, by his words, acts, or silence, gave the plaintiffs to understand that it was not forged, but was a genuine signature, intending thereby to cause the plaintiffs to rely on the note as his note, and the plaintiffs did so rely and act upon it, and were injured thereby, the defendant would be estopped to deny that his name was not a genuine signature, and that it was not put there by him or by his authority."

The counsel for the assignee asked the Judge to give these instructions: "1. Estoppels are not favored in law, because they operate to shut out the truth, and to prevent parties from asserting or defending their rights by proof of actual existing facts. 2. There must be shown a willful intent to induce the party to act on the faith of the alleged statements or representations, in addition to the fact that such statements were acted upon."

The Judge gave the second instruction, as comprised substantially in the instructions already given, but declined to give the first.

The Judge stated to the jury that if they found their verdict for the plaintiffs, he should inquire of them whether they found it on the ground that the defendant executed the note, or the ground of estoppel. The jury found for the plaintiffs, and answered in writing that they found on the ground that the defendant had "acknowledged the signature to the note."

The defendant then filed a motion for a new trial; but the Judge overruled the motion, on the ground that it appeared, by the special finding of the jury, that they did not find for the plaintiffs on the ground of estoppel, but on the ground that the defendant had acknowledged the signature of the

note to be his; and being of the opinion that upon that ground the verdict was not against the weight of evidence.

To the above rulings and refusals to rule the assignee alleged exceptions.

GRAY, C. J. Although the signature of Edward H. Jackson was forged, yet if, knowing all the circumstances as to that signature, and intending to be bound by it, he acknowledged the signature and thus assumed the note as his own, it would bind him, just as if it had been originally signed by his authority, even if it did not amount to an estoppel *in pais*: *Greenfield Bank v. Crafts*, 4 Allen, 447; *Bartlett v. Tucker*, 104 Mass. 336, 341. The answer of the jury to the question of the Court shows that they found for the plaintiffs upon this ground, and renders immaterial the instructions given or requested upon the subject of estoppel.

The schedule of creditors, signed by the debtor, was competent evidence, as an admission that his signature to the note was made by him or by his authority. All doubt as to the admissibility of this evidence, as against his assignee, is dispelled by referring to the provisions of the Bankrupt Act. The schedule is required to be annexed to and filed with the petition in bankruptcy, and must therefore have been prepared before the commencement of the bankruptcy proceedings, by relation to which the title to the debtor's property vests in his assignee: U. S. Rev. Sts., §§ 5014, 5044. And if the assignee elects to assume the defense of a suit then pending against the bankrupt, he can only "defend the same in the same manner and with the like effect as it might have been defended by the bankrupt." § 5047.

Exceptions overruled.

Greenfield v. Crafts, 4 Allen, 447; *Story*, 240, note; *Mechem*, 116; *Bishop Con.* 295, 345.

Forgery—The Contrary Opinion.

But it has been held that, as a forgery is void, it is not susceptible of ratification.

WORKMAN v. WRIGHT.

Supreme Court Commission of Ohio, 1878.

33 Ohio St. 405.

WRIGHT, J. Under the pleadings and findings of the Court below, it may be assumed that the name of Calvin Wright was a forgery, as there was evidence tending to show the fact, and we cannot say that the conclusion reached, in this respect, was clearly against the testimony. It is claimed, however, that his admissions, and promises to pay the note, ratified the unauthorized signatures.

Had Workman, the owner of the note, taken it upon the faith of these admissions, or had he at all changed his status by reason thereof, such facts would create an estoppel, which would preclude Wright now from his defense. This appears from most of the authorities cited in the case. But no foundation for an estoppel exists. All these statements of Wright, whatever they were, were made after Workman became the owner of the paper. Workman did not act upon them at all; he was, in no way, prejudiced by them, nor did they induce him to do, or omit to do, anything whatever to his disadvantage. But it is maintained that, without regard to the principle of estoppel, these admissions and promises are a ratification of the previously unauthorized act, upon the well-known maxim, *Omnis rati habitio retrotrahitur et mandato priori æquiparatur*.

It is said, that a distinction exists between the classes of cases to which this principle applies. Where the original act was one merely voidable in its nature, the principal may ratify the action of his agent, although it was unauthorized. But where that act was void, as in case of a forgery, it is said no ratification can be made, independent of the principle of

estoppel, to which we have alluded. Most of the authorities, cited by counsel for plaintiff in error, are of the first class, where the act was only voidable.

Bank v. Warren, 15 N. Y. 577, was where one partner, without authority, and for his own exclusive benefit, indorsed his own note in the firm name, his copartner was held bound by a subsequent promise to pay it, without any independent consideration.

In *Croust v. DeWolf*, 1 R. I. 393, the third clause of the head note is, "Where the person, whose signature is forged, promises the forger to pay the note, this amounts to ratification of the signature, and binds him." But an examination of the case shows that evidence was offered to prove that plaintiff had bought the paper in consequence of what defendant said to him, and the Court charged that, if before purchasing the note, plaintiff asked defendant if he should buy, and he was told he might, defendant could not excuse himself on the ground of forgery. So that the case may be put upon the ground of estoppel, without relying upon the ground stated in the head note quoted.

Harper v. Devene, 10 La. An. 724, was where a clerk of a house signed the name of the house by himself as agent. Defendant, a member of the house, afterward took the note, corrected its date, and promised to pay it; and this was held a ratification to make him liable. In this case, and many like it, it may be remarked that the agent assumed to have authority, and does the act under that belief; but in case of a forgery, there is no such authority and no such belief.

The case of *Forsythe v. Day*, 46 Me. 177, involves the principle of estoppel.

The cases of *Bank v. Crafts*, 4 Allen, 447, and *Howard v. Duncan*, 3 Lansing, 175, sustain the views of plaintiff in error, holding that a forgery may be ratified, independently of the principle of estoppel, and in the absence of any new consideration for the ratifying promise—a conclusion, however, to which we cannot agree.

The case in 3 Lansing is criticised in 3 Albany Law Journal, 331.

Upon the other hand, there are authorities holding that a forgery cannot be ratified. There is a fully considered case in the English Exchequer: *Brook v. Hook*, 3 Albany Law Jour. 255; 24 Law Times, 34. This was a case where defendant's name was forged, and he had given a written memorandum, that he would be responsible for the bill. Chief Baron KELLY places his opinion upon the grounds: 1. That defendant's agreement, to treat the note as his own, was in consideration that plaintiff would not prosecute the forger; and 2. That there was no ratification, as to the act done—the signature to the note was illegal and void. And though a voidable act may be ratified, it is otherwise when the act is originally, and in its inception, void. The opinion fully recognizes the proposition, that where acts or admissions alter the condition of the holder of the paper the party is estopped, but it is necessary that such a case should be made. It is further held, that cases of ratification are those where the act was pretended to have been done for or under the authority of, the party sought to be charged, which cannot be in case of a forgery. A distinction is also made between civil acts, which may be made good by subsequent recognition, and a criminal offense, which is not capable of ratification. Baron MARTIN did not concur. In *Woodruff & Robinson v. Monroe*, 33 Md. 147, this is held: "If, in an action against an indorser of a promissory note by the *bona fide* holders thereof, it be shown that the indorsement was not genuine, and the defendant did not ratify or sanction it prior to the maturity of the note and its transfer to plaintiff, he is not liable. But if he adopted the note prior to its maturity, and by such adoption assisted in its negotiation, he would be estopped from setting up the forgery in a suit by a *bona fide* holder. But any admissions, by the defendant, made subsequently to the maturity of the note, would not be evidence that he had authorized the indorsement of his name thereon." See, also, *Williams v. Bayley*, L. R., 1 Appeals, H. L. 200.

In *McHugh v. County of Schuylkill*, 67 Pa. St. 391, the defense to a bond was forgery. The Court below charged that if the obligor subsequently approved and acquiesced in the forgery or ratified it, the bond was binding on him. It was held that, there being no new consideration, the instruction was error; also, that a contract infected with fraud was void, not merely voidable, and confirmation without a new consideration was *nudum pactum*. See, also, *Negley v. Lindsay*, 67 Pa. St. 427. Daniels recognizes this proposition: 2 Daniels Neg. Inst., § 1352.

Upon principle we cannot see how a mere promise to pay a forged note can lay the foundation for liability of the maker so promising, when the promise was made, as it was, under the circumstances set forth in the record. In addition to the fact that there are no circumstances to create an estoppel, there was no consideration for the promise. Wright received nothing, and it is a simple *nudum pactum*. The consideration for a promise may be either an advantage to the promisor or a detriment to the promisee, but here neither exists. Wright had signed a note, and when the one in suit was shown him, said he would pay it, supposing it to be the one he had signed. He was an ignorant man who could not read writing, though he could sign his name, and when he saw the paper, seeing that the signature spelt his name, and being unable to read the body of the instrument, he said it was all right, and he would pay it. But the promise was without that consideration which would make it a binding contract.

Judgment affirmed.

Bishop Con. 847; *Woodruff v. Munroe*, 33 Md. 147; *McHugh v. County of Schuylkill*, 67 Pa. St. 391; *Corser v. Paul*, 41 N. H. 24.

3

REQUISITES OF RATIFICATION.

Capacity of Principal.

The person ratifying must have had and still have capacity to do and delegate the act.

O'CONNOR v. ARNOLD.

Supreme Court of Indiana, 1876.

53 Ind. 203.

BIDDLE, J. The appellees placed an account against the appellant, for merchandise sold and delivered to him, in the hands of Richard Norris, an attorney, for collection. Norris proceeded by suit and recovered judgment against the appellant for \$497.34. This is the judgment before us, which the appellant seeks to reverse.

Before suit was brought, while the account was in the hands of Norris for collection, and after it had been presented for payment to the appellant by Norris, the appellant paid to G. D. Henkle, to be credited on the account, \$150, for which Henkle, who occupied the same room with Norris, but had no business connection with him, gave a receipt accordingly, signed, "Richard Norris, per G. D. Henkle." At the time Henkle so received the money from the appellant and gave the receipt for it, he had no authority from the appellees nor from Norris to so receive it. On being told of the transaction by Henkle, Norris ratified the act; but, afterward, on ascertaining that the appellees never had received the money so paid to Henkle by the appellant, he repudiated the act of Henkle. The money never came to the hands of Norris, and the appellees never authorized nor ratified the act of Henkle. Were the appellees bound by the payment thus made to Henkle by the appellant and so ratified by Norris? This is the sole question in the case. If they were so bound, the judgment is too much by \$150 and interest upon it. If they were not so bound, then the judgment is right.

"When a demand is placed in the hands of an attorney-at-

law for collection, without any special instructions, the authority conferred upon, and the duty assumed by, him is [are] to use due diligence to collect the debt by suit or otherwise. He has no authority to compromise with the debtor, and cannot bind his principal by any arrangement short of an actual collection of the money:" *Miller v. Edmonston*, 8 Blackf. 291. The same principle is adhered to in *Corning v. Strong*, 1 Ind. 329. The agency of Norris involved in its duties particular learning and professional skill. These he could not delegate. The act of an agent appointed by an agent will not bind the original principal, unless the appointment of such sub-agent was by authority expressed or implied, or afterward ratified by the principal. The relation of principal and agent did not exist between the appellees and Henkle, and it is plain that Norris could not, by virtue of his agency from the appellees, appoint Henkle a substitute, so as to make his acts bind the appellees; and if this be plain, it is just as plain that the ratification of Henkle's acts by Norris did not bind the appellees. If he could not authorize the act, he could not ratify it. When the appellant paid the money to Henkle, he had no reason to suppose that Henkle was the agent of the appellees, or that his act would bind them. Indeed, he had strong reasons to believe otherwise; because he knew that the claim was in the hands of Norris for collection. We are of opinion that the \$150 was not a proper credit against the account of the appellees. The two cases cited above we regard as in point with this case. The following cases touching agencies, though not directly in point, fortify this opinion: *Smith v. Gibson*, 6 Blackf. 369; *Kirk v. Hiatt*, 2 Ind. 322; *Pruitt v. Miller*, 3 Ind. 16; *Reitz v. Martin*, 12 Ind. 306; *Berry v. Anderson*, 22 Ind. 36; *Cruzan v. Smith*, 41 Ind. 288; *Rathel v. Brady*, 44 Ind. 412; *The Indianapolis, etc., Union v. The Cleveland, etc., R. W. Co.*, 45 Ind. 281; *Loomis v. Simpson*, 13 Iowa, 532; *Smith v. Sublett*, 28 Texas, 163.

The judgment is affirmed, with costs.

Mechem, 125, 126; *Hastings v. Bangor*, 18 Me. 436; *McArthur v. Times Co.*, 48 Minn. 319; *Zottman v. San Francisco*, 20 Cal. 96.

Knowledge of Material Facts.

The principal must have knowledge of all material facts, and know that he will not be bound without ratification.

BILLINGS *v.* MORROW.

Supreme Court of California, 1857.

7 Cal. 171.

MURRAY, C. J. This was an action of ejectment in the Court below.

The plaintiff derails his title from John A. Sutter, Sr., through sundry mesne conveyances, the first of which purports to have been executed by virtue of a power of attorney from Sutter to Henry A. Schoolcraft, dated the 28th of July, 1849, which is in the following words, viz.: "John A. Sutter to Henry A. Schoolcraft: Know all men by these presents, that I, J. A. Sutter, have this day made, constituted, and appointed Henry A. Schoolcraft my true and lawful attorney, for me and in my name to superintend my real and personal estate, to make contracts, to settle outstanding debts, and generally to do all things that concern my interest in any way, real or personal whatsoever, giving my said attorney full power to use my name to release others or bind myself, as he may deem proper and expedient; hereby making the said Schoolcraft my general attorney and agent, and by these presents ratifying whatsoever my said attorney may do by virtue of this power. In witness whereof, I have hereunto set my hand and seal, this 28th day of July, A. D. 1849. J. A. SUTTER."

It requires but a glance at this instrument to perceive that no authority is contained in it to convey real estate. The power is limited and special, and cannot be extended by implication to other acts more important in their character than those expressly provided in the body of the instrument.

The rule may be thus stated: that where the authority to perform specific acts is given in the power, and general words are also employed, such words are limited to the particular acts authorized.

This rule is too well understood to require illustration, and the learned counsel for the respondents did not seriously contend that the letter of attorney contained any power to sell real estate, but insisted, that the sale, though void or defective, was afterward ratified by Sutter, by a subsequent deed executed by him on the 20th of May, 1850, which is as follows, viz.:

“John A. Sutter to Henry A. Schoolcraft: Know all men by these presents, that I, J. A. Sutter, of Hock Farm, in the territory of California, have this day made and concluded a final settlement with Henry A. Schoolcraft, my acknowledged agent and attorney-in-fact since the 28th day of July, A. D. 1849, for all the business matters and things in anywise appertaining to my interest, and upon such final settlement, I do hereby acknowledge myself held and firmly bound by all his acts as such agent and attorney-in-fact for me; hereby ratifying and confirming by these presents, whatsoever he may have done in my name or under my seal at any time heretofore, and also do I acknowledge the receipt in full of all sums of money, dues, obligations, and other things, of the said Henry A. Schoolcraft, belonging to me, on account of said agency and attorneyship in fact, and that on the part of said Henry A. Schoolcraft, there is nothing due or owing to me up to the date of these presents. Witness my hand and seal, at Sacramento, California, this 20th day of May, in the year of our Lord eighteen hundred and fifty.

(Signed.)

J. A. SUTTER.”

This paper does not, upon its face, purport to be a ratification of sales of land made by Schoolcraft, but a deed of settlement between Sutter and his agent, by virtue of the power, of the 28th of July, 1849, in which he, Sutter, “acknowledges himself held and firmly bound by all his acts as such agent or attorney-in-fact,” etc. So far as this deed goes, it can only be regarded as a settlement or adjustment of accounts between principal and agent, and does not contain a single word with regard to any acts of Schoolcraft, other than those done by authority of the power of attorney of July 28, 1849, to which reference is made.

It is a well-settled rule that a principal who ratifies the acts of his agent must be made acquainted with the character of those acts, and unless all the circumstances are made known to him, the ratification is void.

In the present case, it does not appear from the deed that Sutter knew that Schoolcraft had exceeded his authority by selling real estate; neither is the fact established by evidence *aliunde*. Whether parol evidence is admissible to establish this fact, is a question which we do not propose to examine in this case, as there was no attempt to introduce it on the trial, and as the question is of much importance to those claiming under similar titles, it is deemed advisable to withhold any expression of opinion until the point is directly presented.

In addition to this, another question of no little difficulty may suggest itself, viz.: Whether the deed to Schoolcraft, treating it as a confirmation, would inure to the benefit of those who had purchased from him, or whether a deed direct from Sutter to them would not be necessary.

As this case now stands before the Court, the plaintiffs cannot recover. The power of attorney contains no authority to sell land; the deed of ratification does not show upon its face, that Sutter knew how, or to what extent, the authority had been exceeded, and this fact is not established by any evidence whatever; neither was Sutter bound to take notice of the recorded conveyances by his attorney; first, because many of these records imported no notice, and second, because not having given authority to sell, it was not reasonable to suppose his agent would transcend that authority.

Judgment reversed, and cause remanded.

Whitney *v.* Martine, 88 N. Y. 535; Ritch *v.* Smith, 82 N. Y. 627; Smith *v.* Tracy, 36 N. Y. 78; Friesenhahn *v.* Bushnell, 47 Minn. 443; Mechem, 128, 129; Story, 239, note.

Must Ratify All.

The act must have been done in the principal's behalf, and he must ratify all or none.

HAMLIN *v.* SEARS.

New York Court of Appeals, 1880.

82 N. Y. 327.

EARL, J. This action was brought for the conversion by the defendants of a quantity of barley which, at the time, belonged to Daniel Stanley, the assignor of the plaintiff. The defendants, in their answer, admit that Stanley owned the barley, but allege that they purchased it of Charles H. Marsh, who had full power and authority to sell it.

Upon the issue thus made, the referee found against the defendants. The General Term did not disturb the findings of facts; and we are, therefore, only to inquire whether the referee erred as to the law applicable to the facts found, or to such facts as ought to have been found upon undisputed evidence.

The facts show that the barley was, in the winter of 1872 and 1873, in a warehouse owned by Marsh, at Avon, and that he took the barley without the knowledge, authority, or consent of Stanley, and shipped it in his own name and on his own account to the defendants at Buffalo, to whom he sold it in his own name. He did not assume to act as agent for Stanley, and the defendants did not deal with him as such agent, and Stanley had never clothed him with any apparent authority as his agent to sell this barley, and had never held him out as such.

But upon facts now to be stated, it is claimed by the learned counsel for the defendants, and the General Term has held, that Stanley ratified the sale made by Marsh, and hence, became bound thereby. The first car-load of the barley was shipped to the defendants December 31, 1872, and the last car-load March 7, 1873. In the latter month, Stanley discovered that a large portion of his barley had been taken away; and

he made inquiry of Marsh about it and was informed by him that it was in a malt-house in the same village, and he was thus induced to rest easy about it until July, when, by examination at the railroad office, he, for the first time, discovered that it had been shipped to Buffalo. This was about five months after the last barley had been shipped. It does not appear that Stanley thereafter, prior to May, 1874, made any efforts to follow or reclaim the barley, and in that month he made a general assignment to the plaintiff for the benefit of his creditors. This claim against the defendant was not inserted in the schedule of Stanley's assets made after the assignment, but he testified that he thought he mentioned it to his attorney at the time the schedule was made. The plaintiff testified that he did not hear of this claim until some time after the assignment was made, and that he first called upon the defendants and made claim upon them for the barley in January, 1875, and that was the first time that they learned of the claim that the barley belonged to Stanley and was wrongfully taken and sold to them.

Upon these facts the alleged ratification is claimed to be made out. The counsel for defendants requested the referee to find, as matters of fact, "that Stanley ascertained, as early as July 21, 1873, that all of said barley had been shipped to defendants at Buffalo, N. Y., and by and on account of said Charles H. Marsh;" and that "Stanley at no time thereafter ever notified defendants, or either of them, of any want of authority on the part of said Marsh to sell said barley, or to ship it in the form in which it was shipped, or to receive payment therefor;" and he refused so to find. And he requested the referee to find, as a conclusion of law, "that such action of said Stanley, with knowledge of the facts as aforesaid, amounted in law to an acknowledgment and ratification of the authority of said Marsh, as the agent of said Stanley in making such sales and shipments of barley and receiving payment therefor, and render such transactions on the part of said Marsh in the premises of binding force and effect upon said Stanley and upon his assignee, the plaintiff;" and he

refused so to find and decide. The counsel for defendants bases his contention here upon such requests and refusals.

The general doctrine that one may, by affirmative acts, and even by silence, ratify the acts of another who has assumed to act as his agent, is not disputed. It is illustrated by many cases to be found in the books, and set forth by all the text writers upon the law of agency: Story on Agency, § 251 a; 2 Greenl. on Ev., §§ 66, 67; 2 Kent's Com. 616; Thompson v. Craig, 16 Abb. [N. S.] 29; Wilson v. Tumman, 6 Mann. & Gr. 236; Watson v. Swann, 11 C. B. [N. S.] 756. But the doctrine properly applies only to cases where one has assumed to act as agent for another, and then a subsequent ratification is equivalent to an original authority. One may wrongfully take the property of another not assuming to act as agent, and sell it in his own name and on his own account, and in such case there is no question of agency, and there is nothing to ratify. The owner may subsequently confirm the sale, but this he cannot do by a simple ratification. His confirmation must rest upon some consideration upholding the confirmation, or upon an estoppel: Workman v. Wright, 36 Ohio St. 405.

Here Stanley did no act, and said no word ratifying the sale of his barley. The most that can be claimed is that after he discovered that the barley had been shipped to the defendants he made no efforts to reclaim it, and gave no notice of his title to the defendants. No estoppel can be claimed, as the defendants did not rely upon Stanley's silence, and were not, so far as appears, damaged thereby. So that it comes down to this: When the property of one man is wrongfully taken and sold by another, in his own name and for his own benefit, must the owner, when he afterward discovers the wrong, make efforts to reclaim his property, or notify the purchasers of his claim at the risk of losing his property? There is no authority holding that such a duty rests upon the owner of property wrongfully taken and converted. The mere silence of the owner, under such circumstances, will not bar his claim, if it be short of the time prescribed in the statute of limitations. The rule of

caveat emptor applies, and the purchaser must see to it that he buys of one who owns the property or has authority to sell.

We have carefully examined all the authorities cited by the learned counsel for the defendants, and it is sufficient to say of them, that they in no degree sustain the novel doctrine contended for by him. The maxim that "he who has been silent when in conscience he ought to have spoken shall be debarred from speaking when conscience requires him to be silent," cannot be invoked in this case. It would have been applicable if Stanley had stood by and in silence permitted Marsh to deal in or sell his property, or if hearing that he had taken his property, he had in silence seen the defendant pay him for the property. When he first heard of this wrong, the property had been taken and paid for, and the time when conscience required him to speak was passed. His silence induced no act and did no wrong.

The plaintiff, as a witness on his own behalf, was asked this question: "What was the market value of barley in Avon in March, 1873?" To this defendants' counsel objected that the witness was not shown to be competent to speak as to the value of the barley in suit, and that his evidence should be confined to that barley. The objection was overruled and the witness was allowed to answer. Barley is a well-known commodity, and has a market price, and one who knows it can testify to it. The general market price of barley was one of the elements from which the referee, with other evidence, could arrive at the value of the barley in suit. There was, therefore, no error in receiving the evidence.

The learned counsel for the defendants requested us, in case we reached a conclusion upon the law different from that reached by the Court below, that we should suspend our decision and give him an opportunity to apply to that Court for an order showing a reversal of the judgment of the referee upon the facts as well as the law. This request we cannot grant. That Court filed its decision nearly two years ago. The appeal to this Court was taken more than one year ago, and to grant the request now, after the case had been argued, submitted to us, and a

conclusion reached thereon, would not be just to the plaintiff. There is no suggestion that the Court below actually reversed the judgment upon questions of fact, and the opinion there pronounced shows that the reversal was upon the law of the case. It certainly would not be proper, after the appeal has been taken to this Court, to allow a new decision to be made by that Court to defeat such appeal. If, however, that Court actually did reverse the judgment upon the facts as well as the law, the defendants should, before the argument and submission of the case, and with proper diligence, have taken proceedings to have the order there made so amended as to express the truth. It is too late now. To hold otherwise would be setting a precedent which would lead to great embarrassment in our practice and injustice to parties.

We conclude, therefore, that the order of the General Term should be reversed and the judgment upon report of referee affirmed, with costs.

Order reversed and judgment affirmed.

Mitchell v. Minnesota Fire Ass'n, 48 Minn. 278; *Knappen v. Freeman*, 47 Minn. 491; *Fowler v. New York Exchange*, 67 N. Y. 138; *Story*, 251 *a*; *Mechem*, 130; *Humphrey v. Havens*, 12 Minn. 298.

4

EXPRESS RATIFICATION.

The act of ratification must be of the same nature as is required for conferring the authority; hence when sealed authority is indispensable sealed ratification is required, or if written authority is required written ratification must appear.

SPOFFORD v. HOBBS.

Supreme Judicial Court of Maine, 1848.

29 Me. 148.

TENNEY, J. The deed containing the covenants alleged to have been broken purports to have been executed by Samuel Lowder as the attorney of Benjamin Bussey. The authority of the attorney to execute the deed was denied, on the ground

that the deed was for a purpose not contemplated by the parties to the letter of attorney. The power gives authority to the attorney "in my name and behalf, to bargain and sell to any person or persons, for the purpose of making actual settlements thereon, any lots or tracts of land, not exceeding five hundred acres;" "and in my name and behalf to sign, seal, and deliver as my deed legal and sufficient deed and deeds, containing the several covenants and a general warranty to convey to such purchaser or purchasers, or their heirs or assigns, such lot or tract of land in fee simple;" "hereby ratifying and confirming all and whatsoever my said attorney shall lawfully do in and about the premises." There was evidence by parol, from witnesses introduced by the plaintiff, that the contract for the purchase of a tract of land embracing that described in the deed introduced was made by the purchasers with Bussey himself, who gave verbal directions to the attorney to make the conveyance, and that upon its being made accordingly, notes were taken for the consideration, secured by a mortgage of the same land, which mortgage was subsequently discharged, Bussey himself having received the money which was paid upon the notes, and given his receipt therefor on the books of the agency; that the purchase was made for speculation, and not for settlement. The Court who tried the case "ruled, that the action was not maintainable, that Lowder had no authority by the power produced to execute the deed, and that there was no evidence from which a ratification could be legally inferred, so as to make the deed obligatory on Bussey;" to which rulings exceptions were taken.

The verbal directions from Bussey to Lowder could confer no power upon the latter to make the conveyance in the name of the former; and they were equally impotent to increase the authority contained in the power of attorney.

It is insisted that there was a subsequent ratification of the act of Lowder in giving the deed by Bussey, which has given to it full and complete effect. A ratification cannot stand on higher ground than an original authority, and must be by an instrument under seal: Story's Agency, §§ 49 and 242.

The mortgage is relied upon as a ratification on the ground of estoppel. And if there is anything therein which can estop the mortgagee on legal principles from denying the conveyance of the land, the ruling of the Court was erroneous.

"Every estoppel, because it concludeth a man to allege the truth, must be certain to every intent, and not be taken by argument or inference. Every estoppel ought to be a precise affirmation of that which maketh the estoppel, and not be spoken impersonally." Co. Litt. 352, b. In *Bowman v. Taylor*, 2 Ad. & Ellis, 278, Lord DENMAN says: "The doctrine of estoppel has been guarded with great strictness, not because the party enforcing it necessarily wishes to exclude the truth, for it is rather to be supposed that that is true which the opposite party has already recited under his hand and seal; but because the estoppel *may* exclude the truth. However, it is right that the construction of that which is to create the estoppel should be very strict."

The mortgage deed and the notes referred to therein are all to be regarded as parts of the same mortgage. But neither the deed nor the notes contain any recital of that which was the consideration of the notes, or that the land described in the mortgage was conveyed by the mortgagee to the plaintiffs. There is no certain, direct, and precise affirmation of facts which are absolutely inconsistent with the fact that Lowder had not legal power to execute the deed in the name of Bussey. For aught which appears in the mortgage deed or the notes, the latter may have been given for a consideration wholly distinct from the conveyance of the land, and the former may have been of premises to the title of which previously the mortgager was always a stranger.

The design of Bussey to convey his land only to actual settlers is clearly exhibited by the power of attorney. But where proper proof, satisfactory to the one who was to judge of the intention of the purchasers in that particular, was afforded, it is equally clear that the conveyance was to be conclusive. This is manifest from the language of the instrument, as the deeds were to pass a fee simple estate with all the cov-

enants usually contained in warranty deeds, without a provision that they should contain anything making them void in any contingency. If he had chosen to have made all conveyances himself without the intervention of an agent, adhering to his intention of giving deeds of land for actual settlement only, his unconditional deeds to such as satisfied him that they took them for that purpose would pass the title, though it should afterward turn out that he was grossly deceived, the purchases having been actually made with a different design. His intention, well understood by his grantees, and their deception in that particular, would not affect the deeds. He having undertaken to judge of the evidence of their purpose, and having acted upon the judgment formed in making the conveyances, he would be concluded. When he delegated the power to make conveyances to an attorney, with the restriction contained in the instrument in which he engages to ratify and confirm his legal acts, is it to be supposed that he did not mean to intrust to his judgment and discretion the evidence of the intention of those who proposed to be purchasers, and that he should exercise them in the same manner that the constituent would have exercised his own judgment and discretion if he had acted in the premises? The intention of purchasers, in order to have effect, must have been judged of and determined by some one. No provision having been made for another mode in which the purpose of the purchasers could be ascertained previous to the conveyances, the power to perform that duty must have been intended to be conferred upon the attorney. It is manifestly designed that, upon his being satisfied of this intention in the purchasers, payment being provided for, deeds absolute in their terms and passing a fee simple estate should be executed and delivered by him in the name of Bussey. This would preclude the owner from opportunity to revise the judgment of the agent before the title would vest in the grantees.

If the deeds themselves contained recital of the fact that the purchases were made with the design in the grantees that actual settlement on the land conveyed should be made, this

fact could not be contradicted by parol, inasmuch as the owner had not retained to himself, after the delivery of the deeds, the power to reconsider this question of intention in the purchasers. No more could he claim the right that the jury should judge of acts of the agent, which he had made conclusive upon himself.

The letter of attorney is to be considered in connection with the deeds given by the agent, and as making a part of them; it follows that, when such deeds have been delivered, the attorney had determined that the purchases were made for the object contemplated as much as if the deeds had contained the express statement thereof. The proof of this is under seal, making part of the deeds themselves. It cannot be admitted, Bussey having acted through the judgment of another with full powers for the purpose, by deeds in all respects like those he would have given, that the title should remain in uncertainty; that the tenure, by which the immediate and subsequent grantees should hold after a quiet possession for a longer or a shorter period, should depend, not upon the intention of the purchasers found by the one empowered to judge thereof, whose judgment is evidenced by the deeds themselves, but upon the finding of a jury on an issue to be settled by parol evidence of the most uncertain, equivocal, and varying character, liable peculiarly to be changed almost daily by the frailty of human memory, death of witnesses, and the sinister designs of parties and their agents. The title cannot be thus impeached by the former owner or his representatives by proof that the object was different. It is not pretended in this case that fraud was practised by the agent and the grantees to the injury of Bussey, and it could not be so pretended, for the evidence was plenary that the contract of sale was made by Bussey himself, and that he gave verbal orders to the attorney to execute and deliver the deed in the name of the owner; and such evidence is admissible on the question of fraud.

The evidence that the plaintiffs did not intend the land for settlement, but for speculation, and that it was so understood by the attorney at the time of the execution and delivery of

the deed, came from the plaintiff's witnesses; whether in the direct or the cross-examination does not appear from the case. It is difficult to perceive that the plaintiffs could expect any benefit from this proof; and it was not admissible for the defendants; and it was probably voluntarily stated by the witnesses, or called out on cross-examination, when no objection was interposed. We are by no means prepared to say that, if adduced by the plaintiffs by direct inquiry of the witnesses, it could affect the deed of conveyance, but of this we give no opinion. It does not appear that the ruling of the Judge, "that the power gave no authority to execute the deed," was upon the ground that proof of the design of the plaintiffs when they made the purchase came from them. The ruling was founded upon no such distinction, and we think it was erroneous.

Exceptions sustained.

Despatch Line v. Bellamy, 12 N. H. 205; *Hawkins v. McGroarty*, 110 Mo. 546; *Story*, 242, note; *Mechem*, 136, 138; *Judd v. Arnold*, 31 Minn. 430.

Exception—Partners.—One partner may orally ratify an instrument under seal when such instrument has been executed by his copartners while acting within the scope of the partnership business: *Mechem*, 138; *Peine v. Weber*, 47 Ill. 41.

5

IMPLIED RATIFICATION.

An agent's act may be ratified by silence or by any conduct from which an intent to ratify a contract may be inferred.

HALL v. HARPER.

Supreme Court of Illinois, 1855.

17 Ill. 82.

CATON, J. This was an action of replevin for a horse. The bill of exceptions shows that in the spring of 1852, a son of the plaintiff, about eighteen years of age, and who resided with him, exchanged the horse in question, which belonged to the

plaintiff, with the defendant, for another horse. A few days before the exchange the plaintiff forbid his son to exchange the horse. After the exchange the son took the horse home to the plaintiff. The agreement to exchange was made on Saturday, and the exchange was made several days after. The son told his father, on the Saturday, the agreement which he had made to exchange, and it does not appear that the plaintiff expressly approved of or forbid the exchange. The witness does not seem to remember what his father said about it, only he says he knows his father did not tell him to make the exchange. Nor does it appear, from the son's testimony, that his father made any objections when he brought the horse home which he got of the defendant. The plaintiff was afterward seen riding the horse. A few days after the exchange, the plaintiff told the witness, Snyder, that if the horse which his son had swapped with the defendant for, "lived and lucked well, he would make a horse that would sell for more than the one his son had swapped to defendant." The parties lived about two miles apart, and met several times; and on one occasion the defendant rode the horse in controversy to the plaintiff's house, but nothing was said between them about the exchange of horses which had been made. Two or three weeks after the exchange had been made, the plaintiff was taken sick and remained ill till about the time this suit was commenced. After the exchange the son took the horse home to his father's, where he remained two or three months; at the expiration of which time the plaintiff took the horse back to the defendant and offered to return him, and demanded of the defendant the horse which his son had let him have. The defendant refused to return him, whereupon this suit was brought.

From this evidence the jury was well warranted in finding that the plaintiff had acquiesced in and approved of the exchange of horses which had been made by his son, and thus adopted that act as his own. He did not repudiate the bargain which his son had made for the exchange when he was advised of it before the exchange was actually made, but passively allowed the executory bargain to be executed; and when

his son brought the horse home he made no objections to the exchange, but retained and used the horse obtained of the defendant. He still forbore to remonstrate when he met the defendant several times subsequently, and even when the defendant rode the horse, which he had obtained of his son, to his house. It is plainly inferable, from the evidence, that he retained and treated the horse as his own for about three months, without a word of dissatisfaction or disapproval. An old and just legal maxim may well be applied to the plaintiff here, which says, if he keep silent when duty requires him to speak, he shall not be allowed to speak when duty requires him to keep silence. His continued silence and long apparent acquiescence in the act of his son, well justified the defendant in supposing that it met with his entire approval. He cannot be allowed to lay by and speculate on the chances of a good or a bad bargain, or upon the chances of the horse, procured of the defendant, turning out good or bad; or, to use his own expression, "lucking well." If he intended to repudiate the action of his son, he should have done so promptly, so that the defendant might know what he had to rely upon.

We think a different verdict would not have been justified by the evidence, and the judgment must be affirmed.

Judgment affirmed.

Ehrmanntraut v. Robinson, 52 Minn. 333; *Columbia Mill Co. v. National Bank of Commerce*, 52 Minn. 224; *Saveland v. Green*, 40 Wis. 431; *Foster v. Rockwell*, 104 Mass. 167; *Story*, 90, 255, 259; *Mechem*, 146, 165; *Stearns v. Johnson*, 19 Minn. 540.

Appropriating the proceeds of an act ratifies it: *Lyman v. University*, 28 Vt. 560.

6

EFFECT OF RATIFICATION.

Ratification equals prior authority and is retroactive, making the contract good from the beginning.

WILLIAMS *v.* BUTLER.

Supreme Court of Illinois, 1864.

35 Ill. 544.

BREESE, J. Strong Wadsworth and James Wadsworth, in the year 1857, failed in business in Chicago, having been partners in banking. They were indebted to Williams, the appellant, about \$8,000. In February, 1861, Strong Wadsworth and one John C. Ambler entered into an arrangement by which the latter furnished to the former the sum of \$1,580, belonging to his mother, Mercy Ambler, residing in Massachusetts, and Wadsworth recommenced the banking business in Chicago, under the name of S. Wadsworth & Co. A written contract was entered into between Ambler, acting as agent for his mother, and Wadsworth, by which Wadsworth was to attend to the business on a salary of \$10 per week, and to have an interest therein beyond his wages, the profits and losses to accrue to Mercy Ambler. When, however, they made the first settlement the profits were found to be larger than had been anticipated, and Ambler allowed to Wadsworth one-half the profits instead of the salary, and the business continued, afterward, upon the basis of a partnership between Wadsworth and Mrs. Ambler. The entire capital was furnished by Mrs. Ambler. It appears that John C. Ambler was acting as manager of his mother's affairs, and that she was, to some extent, dependent on him for support, although she had some small means which he invested and controlled for her benefit, and which he sought to keep distinct from his own funds. This arrangement with Wadsworth was made without her knowledge, and she knew nothing of it until the occurrence of the events which led to this suit. In making the

arrangement John C. Ambler was merely acting under his power as general agent.

In December, 1862, appellant commenced suit against Strong Wadsworth and James Wadsworth, on his old claim against them, and in March, 1863, recovered a judgment against Strong Wadsworth (James not having been served) for over \$9,000. An execution was immediately issued, and levied upon the furniture and money found in the office of S. Wadsworth & Co. The money levied on, amounting to over \$6,000, was paid over by the sheriff to appellant, the plaintiff in the execution. Immediately after the levy judgments were confessed by Strong Wadsworth and Mercy Ambler as follows: One in favor of Rutter *et al.* for \$3,003.75, one in favor of Tyler *et al.* for \$1,866.90, and one in favor of Marshall *et al.* for \$1,600, and after an ineffectual attempt to recover by writ of replevin the property levied on Rutter *et al.* filed a bill in behalf of themselves and the other creditors of S. Wadsworth & Co., praying that the property levied on be decreed to be the partnership property of Strong Wadsworth and Mercy Ambler, and, as such, marshaled in payment of their creditors, to the exclusion of the individual creditors of Wadsworth. Appellants Wadsworth, Mercy Ambler, and the sheriff were made defendants to this bill. Williams and the sheriff answered, denying the alleged partnership between Wadsworth and Mrs. Ambler, the oath to their answer having been waived. Mrs. Ambler answered, admitting the alleged partnership, and she also filed a cross-bill setting up the partnership, and praying that the partnership assets might be applied in payment of partnership debts. On the final hearing the Court below so decreed, and Williams brings the record to this Court. It should be further stated that Strong Wadsworth and Mrs. Ambler are admitted to be insolvent, and that the former had drawn all the profits due to him from the business.

It is apparent, from this statement of the facts, that the decision of this case depends upon the effect to be given to the answer and cross-bill of Mrs. Ambler, by which she ratifies

the act of her agent in making the partnership arrangement with Wadsworth. It is denied, however, in the first instance, by the counsel of appellant, that she has legally ratified, there being no proof of authority from her to her attorneys to file the answer or cross-bill, and no proof of her signature to these pleadings which are signed by her in her own proper name.

It is sufficient to say in regard to this, that, in the absence of proof to the contrary, the authority of an attorney of this Court to appear and plead for such parties as he claims to represent, is presumed. If the appellants desired to raise this question in the Court below, or to impeach the genuineness of Mrs. Ambler's own signature to the answer and cross-bill, they should have filed an affidavit and asked for the proper rule. Not having done this they cannot now deny the authority of Mrs. Ambler's counsel to file such answer and cross-bill as they thought proper.

The other question is more difficult, but we have arrived at the conclusion, that the ratification of Mrs. Ambler makes the arrangement between her son and Wadsworth good from the beginning. So far as appears, he had no authority to create a partnership between her and another person, but if an agent assumes to do an act of this sort it may, like any other act of an agent not unlawful, be ratified by the principal, and the ratification relates back to the performance of the act. It is urged, however, that a ratification cannot relate back so as to cut off the intervening rights of third persons. That is doubtless true as a general rule, but if the doctrine of relation is applied merely for the protection of a clearly superior equity, such application would be consistent with recognized legal principles, even though it interferes with the claims of third persons resting upon an inferior equity. We consider the case before us one of that character. The debt of Williams accrued long before John C. Ambler undertook to create a partnership between his mother and Wadsworth. The credit upon which it accrued did not spring from any control which the latter acquired over the property of Mrs. Ambler. So far

as she and her property are concerned, the contracting of the debt had no connection with them. Williams, as a creditor of Wadsworth, was placed in no worse position in consequence of the acts of Mrs. Ambler's agent in forming the partnership, whether such acts were authorized by the principal or not. But how was it with the complainants, the creditors of the firm?

Their debts arose in consequence of money paid by them to S. Wadsworth & Co., for bills of exchange on New York, on the same day with the levy by the sheriff, and the identical money paid by them was part of that seized under the levy. Mrs. Ambler, by giving to Wadsworth the control of her small capital, through her agent, had enabled him to start the business of S. Wadsworth & Co., and procure credit, by selling drafts to these complainants and the other creditors. Although Mrs. Ambler was under no legal obligation to ratify these proceedings of her agent when they came to her knowledge, yet she was under a certain moral obligation to protect, to the extent of her power, those innocent creditors who had become such through means furnished by her and through the acts of her general agent. She recognizes this duty, and by ratifying the act of her agent has made herself personally liable, as a partner in the firm of S. Wadsworth & Co., for the debts of the firm, and is now liable to be sued therefor: *Wright v. Boynton & Hayward*, 37 N. H. 9. These are debts which would have had no existence but for the acts of her agent in dealing with her property and connecting her in a partnership arrangement with Wadsworth. If she is now willing to ratify this arrangement and assume all the liabilities of the firm of S. Wadsworth & Co., *ab initio*, as she does by ratifying, is it not manifestly just that the other incidents of partnership should follow, and the partnership assets be first applied to the payment of the partnership debts? Is it not plain that the equity of the creditors of S. Wadsworth & Co., as against the assets of the business done under that name, and as against the capital furnished by Mrs. Ambler, is superior to that of individual creditors of Wadsworth

whose debts were contracted long before this business was commenced? If Mrs. Ambler is willing to ratify the acts of her agent, are not their equities, as against Williams, precisely what they would have been if he had had full authority to do what he did? We think so, and it follows that the lien of Williams's execution must be treated, in a Court of Equity, as only attaching to whatever interest Wadsworth had in the assets of the firm, after the payment of the firm debts.

The decree of the Superior Court must be affirmed.

Decree affirmed.

Lowry v. Harris, 12 Minn. 255; *Bishop Con.* 849, 1108; *Mechem*, 167; *Story*, 243, 244, note; *Stewart v. Mather*, 32 Wis. 344; *Nesbitt v. Helser*, 49 Mo. 383; *Woodbury v. Larned*, 5 Minn. 339.

Ratification of a tort does not absolve the agent: *Wright v. Eaton*, 7 Wis. 595.

II OF AUTHORITY.

A IN GENERAL.

1

DEFINED.

Authority, power to act for another, is conferred only by the will of the principal expressed or implied.

GRAVES *v.* HORTON.

Supreme Court of Minnesota, 1887.

38 Minn. 66.

(Reported *ante*, p. 42)

Johnson *v.* Hurley, 115 Mo. 513; Story, 3; Pole *v.* Leask, 33 L. J. R. Eq. 155.

2

MUST BE PROVED IN ORDER TO CHARGE PRINCIPAL.

One seeking to charge the principal must prove the agent's authority.

KORNEMANN *v.* MONAGHAN.

Supreme Court of Michigan, 1871.

24 Mich. 36.

CAMPBELL, C. J. Plaintiffs forwarded a bill of goods to defendant, ordered by the latter from one Pearl, who did not mention to whom he intended to send the order. The goods were sent to defendant directly, accompanied by a bill in the name of the plaintiffs. A letter, sent at the same time directing the price to be remitted, is sworn not to have been received.

Defendant gave evidence that after receiving the bill he paid the price to Pearl, but not till he had asked him if he had authority to receive it. There had never been any dealings between plaintiffs and defendant, but defendant had previously dealt with Pearl in agencies for other houses, and had paid him money. Pearl disappeared without paying over the money. The Court charged that plaintiffs, by sending the goods on Pearl's order, authorized defendant to assume he was empowered to receive payment.

There had been no dealings whatever between defendant and plaintiffs whereby defendant could have been enabled to know anything about Pearl's authority. An agent may have as much or as little power as his principals see fit to give him. The evidence here showed no agency whatever whereby he could lawfully bind them to anything. In the absence of actual authority the plaintiffs could only be held on the ground that by their action they had induced defendant to believe Pearl had full authority to receive money for them. If they had sanctioned such conduct before, that might tend to support the claim. But plaintiffs and defendant had never known each other in business before. The goods were not even sent to Pearl for delivery, but were sent direct to the purchaser from the sellers. There was nothing therefore to exonerate the purchaser from ascertaining the agent's powers. This he seems to have supposed he was bound to do, but instead of inquiring of the principals he inquired only of Pearl himself. He had no right to act on anything that did not proceed from the plaintiffs, either as actual authority or in some form of binding admission. There was no proof whatever of either of these essentials, and the payment, therefore, was entirely unauthorized, and in no way bound plaintiffs.

The judgment was erroneous, and must be reversed with costs, and a new trial granted.

Newman v. Ins. Co., 17 Minn. 123; *Brayley v. Kelly*, 25 Minn. 160; *Johnson v. Hurley*, 115 Mo. 513; *Dayton v. Buford*, 18 Minn. 126; *Loudon Society v. Hagerstown Bank*, 36 Pa. St. 498; *Mechem*, 273; *Whiteside v. U. S.*, 93 U. S. 247; *Peabody v. Hoard*, 46 Ill. 242; *Emerson v. Providence*, 12 Mass. 237.

3

EXPRESSED AUTHORITY.

Persons knowingly dealing with an agent whose authority is in express terms must take notice of the nature and extent of the authority.

PEABODY v. HOARD.

Supreme Court of Illinois, 1867.

46 Ill. 242.

WALKER, J. This was a bill in chancery, filed by Francis B. Peabody, in the Superior Court of Chicago, against Samuel Hoard and Henry F. Balch, to enjoin Hoard from prosecuting an action of ejectment which he had commenced in that Court against the tenant of appellant, for the recovery of eighty acres of land. It appears from the record that Henry F. Balch, prior to the 24th day of August, 1853, owned the land in controversy. That he being in immediate need of money, and residing in Salem, Massachusetts, on the 14th day of March (the year is not given), wrote a letter to his brother, Moses P. Balch, in which he authorized him to sell the land. He directed him to sell it, if he could get \$225 for the prairie, and \$25 for the timber land; and all over that price he authorized him to retain for his trouble. He says: "I shall want all the money I can scrape together to pay my way through." From other evidence in the case it seems that this letter was written in March, 1851.

It further appears that Moses owned an adjoining eighty-acre tract which he had bought of one Hall, and was paying him five per cent. per month as interest on \$300 of the purchase-money. He was anxious to get rid of this debt, and offered to sell his own eighty-acre tract to one Smith, but he would not purchase without he could at the same time obtain the eighty acres belonging to Henry F. Balch. A sale was, however, finally made by Moses to Smith of both eighties, and it was so arranged that Smith paid Hall the \$300 debt, with interest already accrued. This payment was thus made, and the \$300 incumbrance to Hall removed from Moses' eighty

acres, and the balance of \$750 was paid to Moses in jewelry. Hall conveyed the eighty acres belonging to Moses, for which he held the legal title, to Smith, and Moses, as the attorney in fact of Henry F. Balch, conveyed to him Henry's eighty acres.

It appears that Moses lived upon his and that Henry's was unimproved land; but it appears that Smith removed to the eighty purchased of Moses, and subsequently fenced the tract which had belonged to Henry. In March, 1860, appellant purchased and paid Henry F. Balch for the land, with no other or further notice than such as arises from adverse possession. In June, 1860, Smith having previously died, appellant purchased the land at a sale made by Smith's administrator, and paid \$96 as the consideration. Probst was a tenant, in possession under the heirs of Smith; he subsequently attorned to both appellee and appellant, but appellee afterward brought the action of ejectment, to restrain the prosecution of which the bill was filed.

The evidence disclosed the fact that Smith, before purchasing, advised with an attorney, who informed him that Moses could not make a valid conveyance under the letter as a power of attorney, and informed him that if he purchased, he would have to run the risk of getting Henry F. Balch to ratify it. He, acting on this advice, took from Moses a bond, in which he bound himself to procure a deed from Henry for the land, conveying it to Smith, within "one year and fifteen months," and in case of failure he was to be liable to pay Smith \$800, as liquidated damages, and upon his paying that sum, Smith was to quit-claim the land to Henry. Moses never procured the deed and did not pay the liquidated damages.

It also appears that Smith paid to Hall \$500, and to Moses the balance in watches and jewelry. And upon this state of facts the question is raised whether appellant is entitled to the relief sought by his bill.

It is undoubtedly true that the letter of Henry F. Balch to his brother Moses gave the latter authority to contract for the sale of the land. To this effect are the cases of *Doty v. Wilder*, 15 Ill. 407, and *Johnson v. Dodge*, 17 Ill. 433. It was there

held that when a party by parol authorizes another to make a contract for the sale of land, if the authority is pursued, and a written agreement is entered into by the agent, a Court of Equity will enforce the performance of the agreement, and that such a case is not within the statute of frauds. But it was held in the latter of these cases that a power to convey land must be in writing, and of equal dignity with the deed to be executed. By the letter Moses was authorized to sell at the price specified, but while the authority was in writing it was not under seal, and consequently the deed made by him, as attorney for Henry, was inoperative to convey the title.

When, however, the whole of the letter is considered it is apparent that Henry contemplated a speedy sale, and only intended to empower his brother to sell in a short time from its date. He did not contemplate a sale years afterward, or even many months. This is apparent from the fact that he says that he "wants all the money he can scrape together to pay his way through." He speaks in the present tense. He says he then wants it; not that he shall want it at some future time. It, however, appears that the sale was not made until two years and five months after he received the authority.

Smith was bound at his peril to see the authority of the agent before he purchased, and in this case did see it, and not only so, but took legal advice upon it, and was informed that it was insufficient; that if he purchased he would have to run the risk of getting it confirmed by the owner. He seems to have concurred in the opinion of the attorney, inasmuch as he took from the agent a bond to indemnify him against loss growing out of the purchase. He could see, and must have known that the letter required a speedy sale, and yet he purchased almost two years and a half afterward. The avenues of information were open to him and he availed himself of them, as he was bound to do in dealing with an agent. He had no pretense even that he was imposed upon, as he was informed that he would acquire no title by the purchase. Yet, knowing these facts, he chose to risk the chances of getting the sale confirmed; or, failing in that, in obtaining indemnity from the agent. Fail-

ing to get a ratification, he only had the right to look to his bond for indemnity.

In this case the letter only authorized a sale for money. It speaks of so many dollars as the price for which the sale could be made, and he says he "wants to scrape together all the money he can to pay his way." There is no pretense that either Smith or Moses P. Balch could have understood that the sale could be made for watches. Yet it seems it was. It is true that \$500 was paid in money, yet Moses sold his improved tract with the other, and appropriated the \$500 to pay the balance of the purchase-money he owed on his tract, which Smith paid to Hall in person. Without a payment of that amount he could not obtain a release from Hall. It would therefore seem that this land was paid for in watches, and such a payment was not authorized by the letter.

Smith having acquired no title by his deed, nor any right to a specific performance of the unauthorized act of Moses Balch, his heirs and assigns could succeed to no better title than he held. The purchaser at the administrator's sale had the means of learning the nature and extent of Smith's claim; and in a matter of such importance the presumption would be that he became fully informed before he purchased. He then cannot urge that any fraud was perpetrated upon him. He no doubt examined the title and learned its character before he purchased. If so, he ran all risks of losing the land, and he is without any equitable remedy. The Court below, therefore, acted properly in dismissing complainant's bill for the want of equity, and the decree must be affirmed.

Decree affirmed.

Van Ostrand v. Reed, 1 Wend. 431; *Harshaw v. McKesson*, 65 N. C. 688; *Blood v. Goodrich*, 9 Wend. 68.

Authority to fill in blanks in deeds can be conferred only by an instrument under seal: *Burns v. Lynde*, 6 Allen, 305; *Preston v. Hull*, 23 Gratt. 600.

Authority to sell real estate must be in writing in Minnesota: Minn. General Stats., 1878, ch. 41, § 10; *Mechem*, 88.

4

IMPLIED AUTHORITY.

Authority may be implied from words or conduct or from the circumstances of the particular case, but it will not exceed the necessary and legitimate effect of the facts from which inferred.

HAZELTINE *v.* MILLER.

Supreme Judicial Court of Maine, 1857.

44 Me. 177.

THIS is an action of *assumpsit* upon an agreement signed "Wm. R. Miller, Agent," and was defended upon the ground that he had no authority to bind the defendant by an agreement for such purposes as are embraced therein.

CUTTING, J., presiding at *Nisi Prius*, ordered a non-suit; to which, and to the rejection of certain evidence, the plaintiff excepted.

This case, upon a mere legal look at the thing, appears to have been rightly non-suited.

The facts most favorably stated for the plaintiff are just these: The defendant owned certain mills and land connected therewith, in the town of Howland. Wm. R. Miller had rented the mills and sold stumpage from the land. Now did that authorize Wm. R. to make a contract for the defendant, to have lumber *cut and hauled*, and on other land? He never had even made such a contract on the mill land. He had *sold*, but never *bought*.

The question is not whether there is evidence tending to show, but is the plaintiff's testimony sufficient to authorize a verdict?

There is not even testimony, taken by itself, tending to show an authority. If there is, there will be too much danger for one man even to employ another.

The key to this case does not appear, as the defense was not reached, but it may be stated as a supposition, and will test the plaintiff's pretension.

There is not a particle of testimony in this case showing

any authority in Wm. R. Miller, to bind the defendant to pay money—to make contracts to pay money—to assume responsibilities. Such an inference of a general agency would be destructive of all business delegation of authority.

There is no evidence of a general agency. It is not every act of employment which renders a party an agent. A clerk with authority to sell goods has no authority to buy goods, and give his employer's note. Nor does an authority in this case, to rent mills and rent lands, authorize Wm. R. Miller to make a contract foreign to renting mills and lands.

Here was a mere limited authority for certain definite purposes. For appropriate illustrations, see cases of *Webber v. Williams College*, 23 Pick. R. 302; *Nash v. Drew*, 5 Cush. R. 424; *Tabor v. Cannon*, 8 Met. R. 456; *Calef v. Foster*, 32 Maine R. 92.

The testimony was rightly rejected. The plaintiff could call Wm. R. Miller as a witness.

RICE, J. No rule of law is better established, or more universally recognized, than that the authority of an agent, to act for, and bind, his principal, will be implied from the fact that such agent has been accustomed to perform acts of the same general character for that principal, with his knowledge and assent. Nor is it necessary, in order to constitute a general agent, that he should have done before an act, the same in specie with that in question. If he have usually done things of the same general character and effect, with the assent of his principal, that is enough. Thus it was held in *Bank of Lake Erie v. Norton*, 1 Hill R. 502, where, by articles of copartnership, one Norton was created agent of a firm, but his authority, as thereby defined, did not extend to accommodation acceptances. It was proved, however, that he was the general agent of the firm, and with their knowledge and assent, was in the habit of drawing bills, and making notes and indorsements for them; though the specific act of acceptance was not mentioned in the evidence, as one that had been usually done, the Court decided that his general power, and the

usage of putting the firm name to commercial paper, in all other shapes, was the same thing, in substance, and calculated to raise an inference in the public mind that he had such a power.

But the acts from which authority to do a specific act can be implied, must be of the same general character and effect. Thus it was held in *Tabor v. Cannon*, 8 Met. R. 456, that an agent who is employed by the owners of a whale ship, to fit her for sea, and purchase the necessary supplies for her voyage, cannot bind the owners by making a negotiable note, or accepting a negotiable bill of exchange in their names, as agent, in payment for such supplies. The Court, in their opinion, remark, there is good reason for this distinction. In a contract of sale, the owners can be liable to no one but the actual sellers of the goods; the consideration may be inquired into; all the circumstances attending the sale may be shown; and all payments and offsets may be adjusted; all which would be precluded if an action could be maintained by the indorser on an acceptance.

In *Webber v. Williams College*, 23 Pick. R. 302, which was on a note given by Mr. Fessenden, of Portland, as agent, for the defendants. Mr. F. was agent for the defendants, at Portland, to manage some interests of theirs growing out of some eastern lands. To avoid an apprehended troublesome controversy, Mr. Fessenden was authorized to advance to a Mr. Ingersoll, one or two hundred dollars, to assist him in paying off a large highway tax. Instead of advancing the money, Mr. Fessenden gave the note in suit. The Court held that the note was made without authority, and was not binding on the defendants.

A general authority to an agent to collect debts, and to pay and receive money, does not authorize him to bind his principal by negotiable instruments; such an authority must be expressly conferred or reasonably implied from the nature of the business to be done: *Rossiter v. Rossiter*, 8 Wend. R. 496.

In the case at bar, the evidence shows satisfactorily that

W. R. Miller was an agent for the defendant. That in that capacity he carried on his mills, at the mouth of the Piscataquis; that he paid the taxes on the defendant's property; that he gave permits for cutting timber on the defendant's lands in Howland and Edinburgh, and collected the stumpage therefor; that he settled and received pay for lumber cut upon the defendant's land without authority. There was also evidence that on one occasion he gave a note to the town of Howland, as the agent of the defendant. There is no evidence, however, that he had any authority to give that note, or that the defendant had any knowledge of its existence till long after it was given, or that he has ever recognized it as a valid note against him.

Now there is a wide distinction between authority in an agent to carry on mills for the owner; to permit parties to cut timber on his lands, and collect the stumpage therefor; to claim indemnity from trespassers; and authority to enter into contracts for carrying on lumbering operations, by which the principal was to be obligated to pay large sums of money. In the one case the agent would be, in different modes, collecting for his principal money arising from the use or proceeds of the sales of his property; in the other, he would be embarking that principal in business enterprises which might involve large pecuniary liabilities and losses. Authority to embark in enterprises of the latter description could not be implied from an admitted agency, with authority to perform acts of the former character.

As to the testimony of the witness, Muzzey, taken in connection with the letter of the defendant, it restricts rather than enlarges the authority of W. R. Miller, as agent of the defendant. No implication of authority to enter into the contract in question can arise from that transaction.

The declarations of W. R. Miller were properly rejected. There must be proof of agency before the declarations of the alleged agent are admissible in any case; and then only such declarations as are strictly part of the *res gestæ*. There being no proof of authority in the agent to perform the principal

act, his declarations, while in the performance of that act, are, as matter of course, inadmissible.

It may well be doubted whether, by the terms of the instrument itself, any persons other than the plaintiff and William R. Miller, are bound by it. But as this point was not raised in the arguments of the counsel, we express no opinion upon it. The non-suit must stand.

Exceptions overruled.

Mechem, 274, 307, 310; *Gulick v. Grover*, 33 N. J. L. 463; *Hull v. Jones*, 69 Mo. 587; *St. L. & M. P. Co. v. Parker*, 59 Ill. 23; *Lawrence v. Winona & St. P. R. R. Co.*, 15 Minn. 390; *Tice v. Russell*, 43 Minn. 66.

5

PRIVATE INSTRUCTIONS.

General Agents.

A general agent's authority cannot be limited by secret instructions.

BUTLER v. MAPLES.

Supreme Court of the United States, 1869.

9 Wall. 766.

ONE Shepherd, living in Desha County, Arkansas, during the war of the rebellion, bought one hundred and forty-four bales of cotton from Maples, plaintiff herein, Shepherd professing to act as agent for Bridge & Co., of Memphis, Tenn., which firm was composed of Hicox, Butler, and others, defendants herein.

Shepherd's authority to make the contract for defendants was based on an article of agreement which empowered him to buy cotton for them in his county and vicinity, not paying an average of more than thirty cents a pound. He was to pay as little as possible on the cotton until it was delivered on a boat or within the protection of a gunboat, after which the ownership should vest absolutely in defendants.

The cotton bought by Shepherd was bought by him as it

lay, he agreeing to pay for it forty cents a pound as soon as it could be weighed. Having been weighed he removed fifty-four bales of it, but ninety bales were burned before it could be placed in a boat to be carried up the river. The fifty-four bales removed were got on board and sent to Bridge & Co., and Maples, the vendor, went to Memphis to see them. He saw Hicox, who wholly denied Shepherd's agency and refused to pay anything for the cotton that was lost, but agreed to pay fifty cents a pound for these fifty-four bales that had arrived. Maples took this sum, supposing, as he alleged, that the assertions about Shepherd's want of authority were true, and only on that account. Seeing Shepherd afterward, Shepherd informed him that they were not true, and Butler and Hicox still denying wholly Shepherd's authority to make the contract and to bind the firm, and still refusing to pay for the cotton that was burnt, Maples sued them in the Court below to recover the price.

On the trial the Court instructed the jury, among other things, as follows:

"A principal is bound by all that a general agent does within the scope of the business in which he is employed as such general agent; and even if such general agent should violate special or secret instructions given him by his principal and not disclosed to the party with whom the agent deals, the principal would still be bound if the agent's acts were within the scope of the business in which he was employed, and of his general agency.

"However, a party dealing with a general agent, who seeks to hold the principal bound for the agent's acts or contracts, must show, in order to recover, that the agent held himself out as general agent, and that in fact he was such general agent.

"If Shepherd held himself out as the general agent of Bridge & Co., then the defendant is bound by the contract which he made with the plaintiff for the cotton, notwithstanding Shepherd may have agreed to pay more for the cotton than his principal had authorized; and if, as general agent of Bridge & Co. to buy cotton in Desha County, Shepherd was

not authorized by Bridge & Co. to buy cotton except to be delivered on board the boat, and in violation of their instructions he did buy the plaintiff's cotton, and agreed to receive and accept delivery of it elsewhere than on the boat, unless the plaintiff knew of these instructions the defendants are bound by the contract which Shepherd made, because it was within the scope of his general agency just as much as was the agreement to give for the cotton a larger price than that to which he was limited by the instructions of Bridge & Co."

Verdict and judgment having gone for the plaintiff, defendants appealed.

STRONG, J. At the trial it was, of course incumbent upon the plaintiff to prove not only the contract of sale, but also that Shepherd, with whom the contract had been made, had authority to act for and bind the defendants. Accordingly evidence was submitted to show that the cotton was purchased by Shepherd when professing to act as an agent for the defendants. There was hardly any controversy about this fact, and no questions are now raised respecting the competency or sufficiency of the proof, or the manner in which it was submitted to the jury. But the authority of Shepherd to make the contract for the defendants and bind them to its performance was stoutly denied, and it is now strenuously insisted that the Court erred in the instructions given to the jury respecting the evidence of his agency. The defendants insist the Court erred in charging that the written agreement between him and Bridge & Co. constituted him their general agent. We do not find that the Court did thus instruct the jury, though it must be admitted the charge may have been thus understood. The jury was instructed that if Shepherd held himself out as the general agent of Bridge & Co., the defendants were bound by the contract he made with the plaintiff for the cotton, though in making the contract he transgressed the instructions he had received, and secret limitations of his authority, which instructions and limitations were not revealed to the plaintiff. It is true, as has

been noticed, there was other evidence of a general agency beyond that which the agreement furnished, but as it was parol evidence, its force and effect were for the jury, and hence the Court could not rightly have charged that the defendants were bound by the contract unless the agreement did itself constitute Shepherd a general agent. But did it not? The distinction between a general and a special agency is in most cases a plain one. The purpose of the latter is a single transaction, or a transaction with designated persons. It does not leave to the agent any discretion as to the persons with whom he may contract for the principal, if he be empowered to make more than one contract. Authority to buy for a principal a single article of merchandise by one contract, or to buy several articles from a person named, is a special agency, but authority to make purchases from any persons with whom the agent may choose to deal, or to make an indefinite number of purchases, is a general agency. And it is not the less a general agency because it does not extend over the whole business of the principal. A man may have many general agents—one to buy cotton, another to buy wheat, and another to buy horses. So he may have a general agent to buy cotton in one neighborhood, and another general agent to buy cotton in another neighborhood. The distinction between the two kinds of agencies is that the one is created by power given to do acts of a class, and the other by power given to do individual acts only. Whether, therefore, an agency is general or special is wholly independent of the question whether the power to act within the scope of the authority given is unrestricted, or whether it is restrained by instructions or conditions imposed by the principal relative to the mode of its exercise. Looking to the agreement between Bridge & Co. and Shepherd, it cannot be doubted that it created a general agency. It was a delegation of authority to buy cotton in Desha County and its vicinity, to buy generally, from whomsoever the agent, not his principals, might determine. It had in view not merely a single transaction, or a number of specified transactions,

which were in the mind of the principals when the agent was appointed, but a class of purchases, a department of business. It is true that it contained guards and restrictions which were intended as regulations between the parties, but they were secret instructions rather than limitations. They were not intended to be communicated to the parties with whom the agent should deal, and they never were communicated. It was, therefore, not error to instruct the jury as the Court did, that the agency was a general one, and that the defendants were bound by the contract, if Shepherd held himself out as authorized to buy cotton, and if the plaintiff had no knowledge of the instructions respecting the mode in which the agent was required to act.

It may be remarked here that the reasons urged by the plaintiffs in error in support of their denial of liability for the engagements made by Shepherd are that he agreed to pay forty cents per pound for the plaintiff's cotton; that he bought the cotton where it lay instead of requiring delivery on board a steamboat, or within the protection of a gunboat; and that he did not obtain a permit from the government to make the purchase. The argument is that in the first two particulars he transcended his powers, and that his authority to buy at all was conditioned upon his obtaining a permit from the government. All this, however, is immaterial, if it was within the scope of his authority that he acted. The mode of buying, the price agreed to be paid, and the antecedent qualifications required of him, were matters between him and his principals. They are not matters in regard to which one dealing with him was bound to inquire. But even as between Bridge & Co. and Shepherd a purchase at forty cents per pound was not beyond his authority. He was authorized to buy "on the best possible terms, not paying an *average* of more than thirty cents per pound." This contemplated his agreeing to pay in some cases above thirty cents. The average was regulated, but no maximum was fixed. Nor is there anything in the agreement that forbade his purchasing cotton deliverable at once

where it lay, though not on a boat or in the protection of a gunboat. He was authorized to purchase deliverable at such times and places of shipment as might be agreed upon; that is, deliverable when and where it might be stipulated between him and the seller. True, he was to pay as little as possible until the cotton was delivered on a boat, or within the protection of a gunboat; and when thus delivered the property in the goods was to vest in the principals, excepting his share of the profits, but he was not prohibited from paying the whole price, or agreeing to pay the whole price, if insisted on by the vendor. The stipulation respecting the vesting of ownership was nothing more than a definition of right between him and his principals, as is manifested by the exception. Nor was Shepherd bound to procure a permit in his own name. He might have been had it been necessary, but if under the permit granted by Bridge & Co. he could purchase as their agent, it was all the agreement required.

It is further objected to the charge given to the jury respecting general and special agency, that it was not applicable to the proof in the case, and was therefore irrelevant and calculated to mislead the jury, and because, as stating abstract questions of law, the instruction was erroneous. If, in truth, it was irrelevant, it was not on that account necessarily erroneous and calculated to mislead the jury. We are not shown, nor do we perceive, how the jury could have been misled by it. They were instructed that, in cases of special agency, one who deals with the agent must inquire into the extent of his authority, but that a principal is bound by all that his general agent has done within the scope of the business in which he was employed, and this, though the agent may have violated special or secret instructions given him, but not disclosed to the party with whom the agent deals. Surely this was correct, and it was applicable to the evidence in the case. It has been intimated during the argument that the Court should have added that no such liability can exist to one dealing with an agent with notice that the particular act of the agent was without authority from the principal. To this

several answers may be made. The exception to the general rule, which it is said the Court should have recognized, is implied in what the Court did say. Again, there was no request for any such instruction; and still again, the evidence in the case did not demand it. There was no pretense that the plaintiff had any notice of secret instructions given to Shepherd, or of any limitations upon his authority. Nor was there anything that imposed upon him the duty of making inquiry for secret instructions or for restrictions. There were no circumstances that should have awakened suspicion. The plaintiff was not apprised that the authority was in writing. The argument is very far-fetched that infers a duty to inquire whether the agent had private instruction from the fact that the contract was made in a region that had been in a state of insurrection.

Story, 73; Mechem, 279, 282; *Peterson v. Lumber Co.*, 51 Minn. 90.

Special Agents.

A special agent's authority, when not apparent, can be limited by secret instructions.

BLACKWELL *v.* KETCHAM.

Supreme Court of Indiana, 1876.

53 Ind. 184.

DOWNEY, C. J. This was an action by the appellee against the appellant and one Stultz on a promissory note, of which they were the makers and he the payee. It is alleged in the complaint, that by the agreement and authority of said Garrett J. Blackwell, his co-defendant, John W. Stultz, signed the name of said Blackwell to said note, and by mistake, signed his name James ^{his} ~~X~~ G. Blackwell, when, in fact, he is generally known by the name of Garrett J. Blackwell. Process was not served on Stultz. Blackwell answered, under oath, denying the execution of the note. Upon a trial of this issue

by a jury, there was a verdict for the plaintiff. The defendant moved the Court for a new trial, for causes specified in his written motion; but the same was denied, and judgment was rendered on the verdict.

The errors assigned are:

1. That the complaint does not state facts sufficient to constitute a cause of action.
2. That the Court improperly refused to grant the defendant a new trial.

The first alleged error is expressly waived by counsel for the appellant.

Under the second assignment, it is urged that the Court erred in excluding certain testimony of one James Shields, offered by the defendant, in giving instruction number three of the general instructions by the Court, and in giving a special instruction asked by the plaintiff. These questions need not all be considered. We pass over the first and go to that relating to the instructions. The third instruction is as follows:

“If you should find from the evidence that Blackwell authorized Stultz to put his name to a note with him for \$300 or \$350, to be executed in consideration of an interest in certain mill property then belonging to one Helton, and you further find that the note in suit was given for said interest in said mill, and the same as was authorized to be given, except that it was for \$475, and larger than defendant authorized, yet, if you should find that the note was received by the payee without any knowledge that Stultz had exceeded his authority, and you further find that there was nothing in the transaction calculated to put him on inquiry or to indicate this want of authority, then Blackwell would be bound, notwithstanding he had not authorized it for the larger amount. Just so, if a man sign his name to a note with another, leaving the amount blank, with authority to his co-obligor to fill it up with any amount not exceeding \$300, and the co-obligor fills it up with \$475; in such a case as this, the party who authorized the blank filled would be bound for the larger amount, if the

payee to whom it was given acted in good faith and had no knowledge of the fraud that the one maker was practicing on the other. The reason of this is, that where one of two innocent parties are to suffer, the one who gives the confidence and enables the fraud to be perpetrated should suffer, rather than the payee who had no knowledge of it."

The special instruction, of which complaint is made, is of the same import as that just set forth.

We are of the opinion that the Court has applied to the case a rule of law not applicable to it. The case of one who signs paper in blank is essentially different from this. In that case, by signing the paper in blank, he impliedly confers upon the party to whom he intrusts it authority to fill up the blanks, so as to perfect the instrument, and this gives him power to fill the blank left for the insertion of the amount which is to be paid: *Holland v. Hatch*, 11 Ind. 497; *Spitler v. James*, 32 Ind. 202; *Gillespie v. Kelley*, 41 Ind. 158.

The case under consideration is wholly different. It presents a question of easy solution, however. Blackwell authorized Stultz to sign his name to a note for \$300, or \$350. Stultz thus became the special agent of Blackwell to do this particular act. A special agent cannot bind his principal in a matter beyond or outside of the power conferred, and the party dealing with a special agent is bound to know the extent of his authority: *Pursley v. Morrison*, 7 Ind. 356; *Reitz v. Martin*, 12 Ind. 306; *Cruzan v. Smith*, 41 Ind. 288; *Berry v. Anderson*, 22 Ind. 36.

The judgment is reversed, with costs, and the cause remanded for a new trial.

Mechem, 288; *Saginaw Co. v. Chappell*, 56 Mich. 190; *Towle v. Leavitt*, 23 N. H. 360; *Cruzan v. Smith*, 41 Ind. 288; *Nininger v. Knox*, 8 Minn. 140; *Mechem*, 280.

6

DELEGATUS NON POTEST DELEGARI.

Subject to exceptions, delegated authority cannot be delegated.

LYNN v. BURGOYNE.

Kentucky Court of Appeals, 1852.

13 B. Mon. 400.

THIS is an action of debt brought by Burgoyne to recover from Lynn the amount of a note, executed by him to the plaintiff for the sum of \$420. Lynn relied for his defense, that there was no consideration for the note.

The plaintiff, Burgoyne, was the agent of the Columbus Insurance Company, Ohio, and resided at Cincinnati; and the note was executed to Burgoyne in consideration that he, as the agent of the company, would issue to the defendant a policy of insurance to the amount of \$6,000, upon the steamboat John Drennon, for one year.

An instrument, signed by the president of the company, purporting to be a policy of insurance, was issued and delivered to the defendant by G. W. Williams, the book-keeper of the company at Cincinnati. This instrument, upon its face, declares that it "shall not be valid until countersigned by John Burgoyne, agent at Cincinnati." It never was countersigned by Burgoyne. But, some time after said instrument had been delivered to the defendant, two indorsements were made upon its back—one extending further privileges to the defendant, and the other transferring the instrument to Smith and others; and these indorsements are signed with the name of Burgoyne by said G. W. Williams; and it is contended that, if the policy were otherwise invalid for the want of the counter-signature of Burgoyne in regular form, that his name to said indorsements by G. W. Williams is a sufficient countersigning to make the instrument a valid policy.

Whether the instrument, had it been issued and delivered by Burgoyne himself, *as a policy of insurance*, would have been valid, notwithstanding an omission to countersign it; and,

whether the indorsements might be regarded as a sufficient countersigning, and sanction of the instrument by Burgoyne, the agent, had he, himself, put his signature to them, need not be decided. For, the issuing of the instrument, and the signatures to the indorsements are, all, the acts of G. W. Williams, the book-keeper.

The deposition of Williams was taken, and he states that he had Burgoyne's "authority for signing policies of insurance; that losses were paid by said company on policies which Burgoyne had never signed in person; and that Burgoyne recognized all his acts, by reason of his connection with the company."

But whatever may have been done by Burgoyne in conferring authority upon Williams, and in recognizing his acts, and in paying losses by him, incurred under policies issued by Williams, is, in our opinion, immaterial. For there is no evidence that the company had been apprized of this mode of doing business at their agency in Cincinnati, and that it had received their sanction and approbation. Whatever effect, therefore, might be given to such acts, in the absence of the counter-signature of the agent, need not be determined. The instrument itself, upon its face, is declared to be invalid, without the counter-signature of the agent, Burgoyne; he alone had authority to issue policies from the office of the company at Cincinnati, and he had no right or power to delegate this authority to another. And if it were conceded, that a policy issued as this was without the counter-signature of Burgoyne, might be rendered valid and effectual by showing a subsequent approval of the company; or, that the company had known, and been in the habit of sanctioning and approving such acts—none of these things were manifested by the proof. The agent of the company, from the nature of their business, and the large amount of capital which may be supposed to be involved, ought to be a man of intelligence, prudence, and integrity. And the agent, in this case, was doubtless selected with an eye to these necessary qualities. He it is in whom the company confided, from what appears in the

record, and not in Mr. Williams, who, whatever may be his intelligence, discretion, integrity, and business capacity, was not the man to whom the important trusts of the company had been committed.

We are of opinion, therefore, from the record in this case, that the instrument exhibited does not appear to be a valid policy of insurance, and, consequently, that there seems to be no consideration for the note sued on.

Wherefore the judgment is reversed, and the cause remanded for a new trial.

Mechem, 184; Story, 13; *Darling v. St. Paul*, 19 Minn. 389; *Warner v. Martin*, 11 How. (U. S.) 209.

EXCEPTIONS.

Ministerial Duties.

Delegated authority of an executive or ministerial character may be delegated.

WILLIAMS v. WOODS.

Maryland Court of Appeals, 1860.

16 Md. 220.

ECCLESTON, J. At the trial of this cause, the plaintiffs offered five prayers; the 2d, 3d, and 5th, were granted without alteration, and the 1st and 4th were modified, by the Court, and then granted. The defendant offered six prayers, all of which were refused.

The judgment was rendered for the plaintiffs upon a verdict in their favor, and the defendant appealed.

One bill of exceptions contains all the evidence and all the prayers.

The plaintiffs examined A. A. White as a witness, who gave evidence tending to prove that White & Elder, as partners, were engaged in the business of merchandise brokers, and in the sale of merchandise on commission. That White as a member of said firm, and under authority from William

Howell & Son, made the sale of coffee now in dispute. That White then ordered R. W. Hall, the clerk of White & Elder, to make an entry of the sale in the blotter of the firm, as said firm usually did in their blotter. That the entry was accordingly made by Hall, in part, and afterward completed by White; which entry is as follows :

"1853, Augt. 26.		C. W., 1244 bags Rio coffee.	
Wm. Howell & Son.		Paper to be satisfactory to the	
Woods, B. & Co.		sellers.	
G	1	26	
W	2	42	
	3	27	
	4	62	
	5	24	
	6	70	
	7	60	
	8	58	
	9	72	
	10	85	
	11	38	
	12	39	
	13	43	
	14	68	
	15	101	
	16	30	
	17	95	
	18	34	
	19	26	
	20	60	
	21	52	
	22	16	
	23	56	
	24	60	
		1244	9 $\frac{3}{4}$ "

The said White, also testified that all of this entry is in the handwriting of Hall, except the figures "9 $\frac{3}{4}$," and the words "paper to be satisfactory to the sellers;" which excepted figures and words are in the handwriting of the witness, who further stated, on cross-examination, that he stood at the table by Hall, while Hall made the entries.

The plaintiffs, in their first prayer, insist that "the said entry is a sufficient note or memorandum, in writing, of a contract, to bind the defendant in this action." The correctness of this proposition is denied by the appellant, for the reason that, if the memorandum was signed at all, it was signed, not by a broker, but by a broker's clerk, who had no authority to do so, the latter acting as sub-agent, only, of the

former, who was but an agent himself, in a transaction or business, which prohibited any delegation of his authority to a sub-agent. But the appellees consider the memorandum equally as valid and binding as if it had been prepared and signed by White himself; because it was written and signed, in the blotter or sales-book of White & Elder, by Hall, their clerk, under the direction of White, he standing by the table whilst Hall made the entry, so far as it was made by him.

Apart from all other objections urged by the appellant to the appellees' first prayer, supposing White & Elder had authority to make sale of the coffee, and did make a sale thereof, and that the terms of said sale are correctly and sufficiently set forth in the entry or memorandum on the blotter of White & Elder, we propose, in the first place, to inquire whether the entry or memorandum is a valid and binding entry or memorandum of the sale, notwithstanding it is all in the handwriting of Hall, their clerk, except the figures "9 $\frac{3}{4}$," and the words, "paper to be satisfactory to the sellers," which are in the handwriting of White? This inquiry presents the legal question, argued before us by counsel, whether a broker, having made a contract of sale, can authorize his clerk to make and sign an entry or memorandum thereof, under his direction and in his presence, so as to bind the parties named in the contract?

This question does not seem to have been conclusively settled. Whilst there are authorities which may be considered as favoring the doctrine that although a broker may, as an agent, make and sign a valid contract, for his principal, yet his agency is such that no portion thereof, under any circumstances, can be delegated to his clerk, there are others which speak of it as an open question, and others, again, seem to sustain the authority of the clerk to reduce the contract to writing, and sign the same, where he exercises no discretion, but merely acts *ministerially* or *mechanically*, under the direction and supervision of his employer, the broker. As authorities of the first class, reference is generally made to *Blore v.*

Sutton, 3 Merivale, 237, and Henderson v. Barnewall, 1 Younge & Jervis, 387.

In Browne on Stat. of Frauds, § 369, after stating the authority of an auctioneer's clerk to write down the name of the buyer, under his principal's direction, the author says: "It has been decided that the rule did not embrace the clerk of a broker." The decision referred to in this note is Henderson v. Barnewall. And the writer adds: "But even this seems now to be open to question." As authority for saying which, he cites Townsend v. Drakeford, 1 Carr. & Kirw. 20.

In Story on Agency, § 13, the learned writer treats of the "Delegation of Agency." He there states that a factor cannot ordinarily delegate his employment, as such, to another; after which he says: "The same rule applies to a broker; for he cannot delegate his authority to another to sign a contract in behalf of his principal, without the assent of the latter. The reason is plain; for, in each of these cases, there is an exclusive personal trust and confidence reposed in the particular party. And hence is derived the maxim of the common law: *delegata potestas non potest delegari*." This is but the enunciation of the general rule that, *ordinarily*, a broker cannot delegate his authority. For the principle just stated is, that a "factor cannot *ordinarily* delegate his employment," and then it is said, "the same rule applies to a broker." In addition to which, the reason for the rule as stated, is, because there is an exclusive personal trust and confidence reposed in the broker. Surely the reason of the rule cannot be applicable where the broker stands by whilst the clerk signs the contract, under his direction, leaving no act of discretion for the clerk to perform.

The propriety of permitting an agent to perform a mere ministerial or mechanical act, by a sub-agent or deputy, even where he could not delegate any portion of his authority, requiring the exercise of the least discretion, is well considered, in the opinion of the Supreme Court of New York, delivered by Mr. Justice COWEN, in Com. Bank of Lake Erie v. Norton, 1 Hill, 504. And there the cases of Blore v. Sutton and Hen-

derson *v.* Barnewall are referred to. The Court quote the language of Lord ELLENBOROUGH in *Mason v. Joseph*, 1 Smith's Rep. 406, when speaking of an agent in relation to a mere *ministerial act*, he says: "Suppose, for instance, he had got the gout in his hands, and could not actually sign himself, he might have authorized another to sign for him."

In *Parsons' Mercantile Law*, 155, note 7, many authorities are cited in relation to the power of an agent to appoint a sub-agent, and then it is said: "A broker cannot delegate his authority." "Nor can a factor." After stating each of these propositions, the writer cites authorities, and then says: "But the power to perform a merely ministerial act, involving the exercise of no discretion, may be delegated." Then he refers to *Mason v. Joseph*, 1 Smith, 406, per Lord ELLENBOROUGH; *Commercial Bank of Lake Erie v. Norton*, 1 Hill, 501, and other cases.

In 1 *American Lead. Cases*, 589 (Ed. of 1857), the principle is recognized that a merely ministerial or mechanical act may be done by a sub-delegate. And the above mentioned case, in 1 Hill, is there referred to.

After mature reflection we are not prepared to sustain the objection to the appellees' first prayer, urged by the appellant, upon the ground that the entry or memorandum is invalid, because it was chiefly prepared and signed by Hall, the clerk. The prayer submits to the jury the inquiry, whether the entry, so far as Hall participated therein, was made by him, under the order of White, and in his presence, also whether the other portion thereof was completed by White. And there is evidence tending to prove such facts. Believing that, under such circumstances, the clerk should not be considered as performing an act of delegated authority, requiring the exercise of any discretion, but merely a ministerial act, under the order and in the presence of White, as one of the firm of White & Elder, the appellant's objection to the prayer is not, in our opinion, a valid objection.

Story, 14; Mechem, 193; *Eldridge v. Holway*, 18 Ill. 446; *Newell v. Smith*, 49 Vt. 255; *Renwick v. Bancroft*, 56 Iowa, 527; *Bodine v. Ins. Co.*, 51 N. Y. 117.

Necessity or Custom.

Delegated authority may be delegated when necessity, custom, or usage of trade requires it.

DORCHESTER BANK *v.* NEW ENGLAND BANK.

Supreme Judicial Court of Massachusetts, 1848.

1 Cush. 177.

WILDE, J. This is an action of assumpsit; but the foundation of the plaintiff's claim is the alleged negligence of the defendants, in not collecting certain bills left with them for collection by the plaintiffs.

The defendants proved that they placed these bills in the hands of the Commonwealth Bank for collection, the same being payable in the city of Washington, where the defendants had no correspondents. This, the plaintiff's counsel contend, the defendants had no right to do, on the ground, that an agent has no right to delegate his authority to a sub-agent, without the assent of his principal. This, no doubt, is generally true; but when, from the nature of the agency, a sub-agent or sub-agents must necessarily be employed, the assent of the principal is implied. Such was the nature of the agency in the present case. It could not have been expected that the defendants would employ one of their own officers to proceed to Washington to obtain payment of the bills. The bills undoubtedly were intended to be transmitted to Washington for collection, and if the defendants employed suitable sub-agents for that purpose, in good faith, they are not liable for the neglect or default of the sub-agents. This was so decided in *Fabens v. Mercantile Bank*, 23 Pick. 330. The Chief Justice, in delivering the opinion of the Court, says: "It is well settled, that when a note is deposited with a bank for collection, which is payable at another place, the whole duty of the bank so receiving the note, in the first instance, is seasonably to transmit the same to a suitable bank or other agent at the place of payment. And as a part of the same doctrine, it is well settled that if the acceptor of a bill or

promisor of a note has his residence in another place, it shall be presumed to have been intended and understood between the depositor for collection and the bank that it was to be transmitted to the place of the residence of the promisor." This decision of the Court on both points is, we think, well founded in principle, and supported by a decided weight of authority. The only opposing decision is in the case of *Allen v. Merchants Bank*, which was first reported in 15 Wend. 482, and which was afterward removed to the Court of Errors, where the judgment of the Court below was reversed by a majority of the Court of Errors. This reversal is opposed to a number of decisions of great authority, and is not, as we think, well founded in principle. If the bank in that case acted in good faith, in selecting a suitable sub-agent, where the bills were payable, there seems to be no principle of justice or public policy, by which the bank should be made liable for the neglect or misfeasance of the sub-agent. And it is admitted, by Mr. Senator Verplanck, who states the grounds of the reversal of the judgment, that the bank would not have been liable, if there had been an understanding or agreement, express or implied, that the bills were to be transmitted to another bank for collection. Now, we think, in that case, as in this, there was manifestly such an understanding. There is another view of that case, taken by the learned Senator, in which we cannot concur. He makes no distinction between the neglect of the officers of the bank where the bills were deposited, and that of the bank to which they were transmitted for collection. We think the distinction is obvious. We agree, however, with the learned Senator, that the decisive question in such cases is, what was the understanding of the parties, as to the duties the collecting bank undertook to perform. And as to this, we have no doubt of the understanding of the parties in the present case. That was, we think, that the defendants were to transmit the bills, or to cause them to be transmitted, to some suitable bank or other agent in Washington, for collection; and the questions are, whether, in employing the Commonwealth Bank to trans-

mit the bills, the defendants acted in good faith; and if so, whether they are responsible for the failure of that bank. That the defendants acted in good faith we cannot doubt. The Commonwealth Bank, at the time, was in perfectly good credit, and had great facilities for obtaining payment of bills and notes payable in distant States. The defendants were the plaintiffs' general agents, and they had no instructions; they were, therefore, to exercise their best judgment as to the transmission of the bills, and the remittance of the money when collected. And we see no cause to doubt that they acted in good faith, and exercised a sound judgment. It was objected that the defendants ought to have made restricted indorsements; but it is a satisfactory answer, that the defendants made their indorsements in the same manner the plaintiffs did. Considering, then, that the defendants acted in good faith, and exercised a sound judgment in employing the Commonwealth Bank, we think there is no principle of law or equity which can subject them to any liability, by reason of the subsequent failure of that bank.

In our opinion, the defendants' responsibility was limited to good faith and due discretion in the choice of an agent to transmit the bills, and to procure a remittance of the money when paid. This case is not distinguishable from the case of *Fabens v. Mercantile Bank*, and the cases there cited.

We do not think that the proof of any usage is necessary to support these decisions; but in the present case, the usage is well proved to have been uniform, in similar cases, ever since the year 1833 or 1834, three or four years before these bills were deposited in the defendant bank.

It was also proved that one bill had been transmitted in like manner, by the defendants, for the plaintiffs, and returned to them with protest, and without objection by them. This was in 1836, more than a year before the bills in this case were deposited. This would be sufficient notice of the usage or manner in which the defendant transacted such business, if any such notice were required. It seems, however, that the usage of a bank is binding on all persons dealing

with the bank, whether they know of the usage or not: *Lincoln and Kennebeck Bank v. Page*, 9 Mass. 155; *Bank of Washington v. Triplett*, 1 Pet. 25. That is a point, however, not necessary to be decided in this case.

Plaintiffs non-suit.

Mechem, 195; *Story*, 14; *Appleton Bank v. McGilvray*, 4 Gray, 518; *Buckland v. Conway*, 16 Mass. 396; *Saveland v. Green*, 40 Wis. 431; *Wilson v. Smith*, 3 How. (U. S.) 763.

B

CONSTRUCTION OF AUTHORITY.

1

WHEN WRITTEN.

The authority being conferred by a written instrument, either formal or informal, its extent must be determined by the writing itself.

CRAIGHEAD *v.* PETERSON.

New York Court of Appeals, 1878.

72 N. Y. 279.

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, affirming a judgment in favor of defendant entered upon a verdict, and affirming an order denying a motion for a new trial. (Reported below, 10 Hun, 596.)

This action was brought upon two promissory notes alleged to have been executed by defendant, which were made payable to the order of Samuel N. Pike, plaintiff's testator, at the Park National Bank. The notes were dated July 12, 1872. They were in fact executed by one Abiel R. Packard, a son-in-law of defendant, in the name of the latter, Packard claiming to act under the following power of attorney :

"Know all men by these presents, that I, Robert Peterson, of the city, county, and State of New York, have made, con-

stituted, and appointed, and by these presents do make, constitute, and appoint Abiel R. Packard, of said city, my true and lawful attorney for me and in my name, place, and stead to draw and indorse any check or checks, promissory note or notes, on any bank in the city of New York, in which I may have an account, and especially in the Irving National Bank of said city, and to do any and all matters and things connected with my account in said Irving National or any other bank in said city, which I myself might or could do, in relation to my deposit account with said Irving National, or any other bank, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever, requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

"In witness whereof, I have hereunto set my hand and seal the eighth day of October, in the year one thousand eight hundred and sixty-nine.

"ROBERT PETERSON, [L. S.]

"Sealed and delivered in the presence of }
 "The words 'promissory note or notes' first interlined. }
 "JOHN S. PATTERSON."

Defendant had no account at the Park National Bank. The Court ruled on the trial that the power of attorney conferred no authority upon Mr. Packard to execute the notes—to which plaintiff's counsel duly excepted.

For the purpose of showing a ratification, plaintiff gave in evidence a mortgage executed by defendant to plaintiffs as executors, dated January 16, 1874, containing the following recital: "Whereas, the said Robert Peterson is justly indebted to the said parties of the second part, in the sum of \$2,000, with interest, lawful money of the United States, secured to be paid by his two certain promissory notes or obligation, bearing date

the 12th day of July, 1872, lawful money as aforesaid, conditioned for the payment of the said first-mentioned sum of \$2,000, with interest thereon, from the date thereof and now past due."

It appeared that the notes were not in fact executed in the business of defendant, and that he did not receive any of the avails, or in any manner any benefit therefrom. The nominal title to the mortgaged property was in defendant, but Packard was the real owner, he having purchased and paid for it and taken title in defendant's name without his knowledge. Packard was in possession, receiving the rents and profits. The mortgage, as defendant's evidence tended to show, was executed at the request of Packard; defendant at first refused to execute it, but upon being advised that the title was in his name, and that it was for Packard's or his daughter's benefit, and was all right, he did so. The person who presented the mortgage to defendant for execution testified that he read the recital to him. Defendant testified that he did not understand or know that the mortgage was given to secure notes, of which he was the maker. Plaintiff's counsel requested the Court to direct a verdict for the plaintiff, which was denied, and said counsel duly excepted.

ALLEN, J. The plaintiffs' testator, taking the notes in suit, made by an agent professing to represent the defendant as his principal, is presumed to have known the terms of the power under which the agent assumed to act. He was bound to ascertain and know the character and extent of the agency, and the words of the instrument by which it was created, before giving credit to the agent. If the testator dealt with the agent without learning the extent of the powers delegated to him, he did so at his peril, and must abide by the consequences, if the agent acted without or in excess of his authority: Story on Agency, § 72. If there was an ambiguity in the language of the power of attorney, there is no reason why in this case there should be a forced or unnatural interpretation of the instrument to save the testator or his representa-

tives from loss. The transaction was in the city of New York, where as well the supposed principal, as Mr. Pike, the plaintiffs' testator, and the professed agent resided, and if the power of attorney was ambiguous in its expression, or of doubtful interpretation, the defendant was accessible either to make the notes in person, or assent to and ratify the act of the agent. There may be cases in which from necessity a party dealing with an agent must act upon his own interpretation of the authority, and take the risk of any doubtful or ambiguous phraseology. But not so here. The record is barren of evidence as to the origin or consideration of the notes. The powers conferred upon the agent were limited, and by the power of attorney as first drawn, Packard, the agent, was only authorized to draw and indorse checks on any bank in which the testator had an account, "and to do any and all matters and things connected with his (my) account in" such banks, which the principal might or could do. The last and general words only gave general powers to carry into effect the special purposes for which the power was given: *Attwood v. Munnings*, 7 B. & C. 278; *Perry v. Holl*, 2 DeG., F. & J. 38; *Rossiter v. Rossiter*, 8 Wend. 494; *Story on Agency*, § 62. The primary and special purpose of the power of attorney was to authorize Packard to draw checks in the business of the principal upon and against his accounts in bank, and to indorse checks probably for deposit to the credit of the same accounts. The insertion of the words "promissory note or notes," by an interlineation after "check or checks," and before "on any bank," etc., must be read with the limited and special purpose of the power as first prepared in view, and not as intending to give a more extended or general power. The making and indorsing of promissory notes, either for discount or payable at the principal's bank, was a natural adjunct of the authority given to draw and indorse checks, and thus deal with and in respect of the bank accounts of the testator. The dealings and business relations of the testator with the banks with whom he dealt, and his accounts with such banks was the subject of the agency, and the instrument creating the agency restricted the

powers of the agent to the making and indorsing of commercial instruments having an immediate connection with the banks with which the principal had dealings, and which would properly enter into his accounts with them.

The act of making the notes in suit was *ultra vires*, and the defendant is not liable thereon. A formal instrument delegating powers is ordinarily subjected to strict interpretation, and the authority is not extended beyond that which is given in terms, or which is necessary to carry into effect that which is expressly given. They are not subject to that liberal interpretation which is given to less formal instruments, as letters of instruction, etc., in commercial transactions, which are interpreted most strongly against the writer, especially when they are susceptible of two interpretations, and the agent has acted in good faith upon one of such interpretations: *Wood v. Goodridge*, 6 Cush. 117; *Attwood v. Munnings*, *supra*; *Hubbard v. Elmer*, 7 Wend. 446; *Hodge v. Combs*, 1 Black, 192.

The evidence of ratification and adoption of the acts of the agent by the giving the mortgages is very slight. The evidence is that the title to the property mortgaged was but nominally in the defendant, having been taken in his name without his knowledge, and as is to be inferred by Packard, the real owner, and this mortgage with another was executed at the request, and as was supposed by the defendant, for the benefit of Packard or his daughter, and upon transactions with which the defendant had no connection. The reading of the recital of the consideration by the gentleman who presented the mortgage to the defendant for execution at the request of Packard, cannot be said to have given him an intelligent appreciation of the fact recited, or the effect it would have upon the legal liability of the defendant, who testified that he did not understand or know that the mortgage was given to secure notes of which he was the maker. The evidence is very decided that the notes were not given in the business of the defendant or for his benefit, and he has never received any benefit or derived any advantage from them so far as appears. A ratification under such circumstances should be the deliberate and inten-

tional act of the party sought to be charged with the full knowledge of all the circumstances: Story on Agency, § 239. The jury have found upon satisfactory evidence that there has been no adoption of these notes, or ratification of Packard's acts by the defendant.

There was no error in the admission of evidence. All the testimony offered and given by the defendant was in respect to the *res gestæ*, and the transactions given in evidence by the plaintiffs, and to disprove any connection with the making of the notes, or the consideration upon and for which they were made, and the relation in which he stood to the property mortgaged, and was all competent, bearing more or less directly upon the question of agency and the alleged ratification of the acts of the agent.

The question to the defendant as to his intent to ratify the giving the notes, was not the most appropriate interrogatory to draw out the evidence sought. The intent of the act was immaterial, if the defendant had deliberately and understandingly executed a deed reciting the notes as made by him and covenanting to pay them. The legal effect of such an instrument would not be evaded by the want of an actual intent to confirm the acts of the agent by whom the notes were made. The answer of the witness only went to the fact that he did not deliberately and understandingly execute the mortgage as one given to secure these two notes as his notes past due.

There was no error upon the trial, and the judgment must be affirmed.

Judgment affirmed.

Mechem, 294; Bishop Con. 381, 382; Wood v. Goodridge, 6 Cush. 117; Hartford Fire Ins. Co. v. Wilcox, 57 Ill. 180; Loudon Savings Society v. Savings Bank, 36 Pa. St. 498; Hunt v. Rousmaniere, 1 Pet. (U. S.) 1.

2

WHEN IMPLIED.

The authority being implied from conduct and the nature of the business to be accomplished, it is only limited by the necessary and appropriate means of executing it and is construed liberally in favor of the agent and third parties.

WILLIAMS *v.* GETTY.

Supreme Court of Pennsylvania, 1858.

31 Pa. St. 461.

THIS action was originally brought before a justice of the peace, by Robert Getty against David Williams, to recover for the breach of the defendant's contract to employ the plaintiff's team of horses and driver. The defendant appealed to the Common Pleas from the judgment of the justice.

David Williams, the defendant, was a contractor on the Northwestern Railroad. During the year 1856 the work was carried on by John O'Leary, who acted as his general manager.

On the 5th of May, 1856, O'Leary made a contract with Getty, the plaintiff, for the labor of a two-horse team and driver, in the prosecution of the work, for a period of four to five months, at \$3.50 per day. After working for seventeen and one-half days O'Leary discharged the driver, without cause, paying him for the time he had worked. The team remained idle for nineteen and one-half days before the plaintiff could find other employment for it. And this action was brought to recover damages sustained by reason of the defendant's breach of contract.

THOMPSON, J. The learned Judge of the Court below charged that "if the principal holds the agent out to the world as a general agent, in the transaction of his business, any contract he would make within the scope of that business would be binding on the principal, although there might be, as between the principal and agent, a restriction upon the general authority of the latter, if the person with whom the

contract was made had no notice of such restriction." And that persons dealing with an agent carrying on a general business, such as a general manager of a railroad contractor, would not be bound to inquire into the particulars of the agent's authority, when held out to the world as such general agent, and particularly as the principal made no objections to his acts, and gave no notice of a restricted authority, although from time to time inspecting the progress of the work.

The plaintiff in error excepts to this, and assigns error upon it, on the ground that as it had been the practice on that work to employ hands by the day, it was an excess of authority in the agent to employ the plaintiff below by the month. And this raises the question whether the practice restricted the authority of the agent, or whether, being a general agent, he was within the scope of his authority in contracting for the usual and ordinary means of accomplishing the business. His business was to advance to completion the work under his care, and this was to be done by the employment of laborers and teamsters. This was apparent and palpable to all, and being so, it is difficult to conceive of any duty resting on a party about contracting to assist in the accomplishment of what the agent had power to do—namely, to construct the portion of the road under his charge—other than to see that he was engaging to do what was usual in such business. The authority of a general agent to contract is implied in the nature and kind of business he has to do, and is only limited to the necessary and appropriate means of accomplishing it. If it were such a business as it was apparent would last but six months a contract for a year doubtless would not be binding on the principal, because the party employed would be acting in bad faith in undertaking when it was apparent he would not be needed; and besides, it would be equally apparent that such a contract was not necessary to the accomplishment of the object. So, if the business were such as would apparently last for months, an employment for one or more months would seem to all to be covered by the agent's implied authority, and would bind.

In Addison on Contracts, 626, the point is treated distinctly and briefly thus: "A foreman intrusted with the general management of a trade or business has an implied general authority from his employer to enter into all such contracts as are usually and necessarily entered into in the ordinary conduct and management of the business;" and he cites the case of *Richardson v. Cartwright*, 1 Car. & Kirw. 328, of a foreman of a saw-mill who took an order from the plaintiff for a large quantity of Scotch fir staves, and agreed to have them ready for delivery within a particular period; it was held that his principal was responsible for the non-fulfillment of the contract, although no particular authority from the principal was shown to authorize the agent to make the contract. See, also, Story on Agency, §§ 55, 56, 87, 97; 2 Kent's Com. 793 and note.

A general power implies the grant of any matter necessary to its complete execution: *Peck v. Harriott*, 6 S. & R. 149; 17 Ohio Rep. 466. And in *Scott v. Wells*, 6 W. & S. 357, it was held that a general agent to make sales was competent to rescind a contract of sale with the consent of the other party. The principle is elementary and uniform that an implied general authority to transact business is only limited to the usual and ordinary means of accomplishing it. This doctrine is not to be confounded with that regulating special agents for limited purposes. There the extent of the authority must regulate the validity of the contract, and one who deals with such an agent must look to that.

We think the Court was entirely accurate in that portion of the charge embraced in the first and second specifications of error, and that the matter complained of in the third was but a corollary thereof and accurate of course. The judgment must be affirmed.

Judgment affirmed.

Armstrong v. Railway Co., 53 Minn. 183; *Whitehead v. Tucket*, 15 East, 408; *Gulick v. Grover*, 33 N. J. L. 463.

3

WHEN AMBIGUOUS.

Ambiguous instructions are construed most strongly against the principal.

MINNESOTA LINSEED OIL CO. *v.* MONTAGUE.

Supreme Court of Iowa, 1884.

65 Iowa, 67.

PLAINTIFF brought this suit to recover a sum of money which it claims to have deposited with defendants, to be paid out only on tickets issued by one Valentine, an agent of plaintiff, in the purchase of flaxseed, but which defendants, without authority, paid to said Valentine in payment of certain commissions. Defendants admit that the money was deposited with them, and that they paid it to Valentine for the purpose alleged by plaintiff, but deny that such payment was unauthorized, and allege that it was subsequently ratified by plaintiff. There was a verdict and judgment for plaintiff, and defendants appeal. The cause has heretofore been in this Court. See 59 Iowa, 448.

REED, J. I. It is alleged in the petition that the money was deposited with defendants upon a parol contract that it was to be paid out by them only on checks or tickets issued by Valentine, on the purchase of flaxseed. On the trial, plaintiff offered in evidence certain letters written by its treasurer to defendants, covering remittances, and which, as plaintiff claims, contained certain specifications as to the manner in which the money remitted should be applied. Defendants objected to the introduction of these letters, on the ground that, as plaintiff had alleged that the contract under which the money was deposited with them was in parol, this written evidence was immaterial and irrelevant, and that it was not shown that the person who wrote them had any authority from plaintiff to give directions as to the manner in which said money should be disbursed. The objections were

overruled, and the letters were read in evidence. We held, on the former appeal, that these letters were admissible. There has been no change in the issues since this ruling was made. The question of the admissibility of the evidence arises on the second trial precisely as it did on the first. When we have once definitely passed on a question in a case, our practice is to reconsider our ruling thereon in that case only on a rehearing, unless there have been such changes of the issues, or other circumstances of the case, as raise a new question as to the applicability of the former ruling to the case as thus made: *Adams Co. v. Burlington & M. R. R. Co.*, 55 Iowa, 94. Our former ruling on this question must therefore be regarded as final, so far as this case is concerned.

II. The original arrangement under which the money was deposited with defendants was made with them by one Harkness, as agent for plaintiff. There was a conflict in the evidence as to the directions given by Harkness at this time as to the manner in which the money should be disbursed. Harkness testified that he directed defendants to pay out money only on tickets issued by Valentine, which should show actual purchases by him of flaxseed; while defendants both testified that the direction was that the money should be paid out generally in the business of purchasing flaxseed for plaintiff, in which Valentine was engaged, and that Harkness informed them at that time that Valentine was to be paid a commission of six cents per bushel on all the seed purchased by him. The evidence shows without conflict that Valentine was entitled, under his arrangement with plaintiff, to receive as commissions on the purchases made by him the amount of money paid him by defendants. The defendants asked the Court to give the following instruction, which was refused: "If the language used by plaintiff's agent in employing defendants as plaintiff's disbursing agents to pay off checks made by Valentine, and instructing them as to their duties as such disbursing agents, was fairly capable of two constructions or understandings, or was ambiguous in its meaning, the plaintiff is bound by the understanding which his lan-

guage fairly and reasonably conveyed to defendants, provided defendants acted in good faith in carrying out such understanding thus fairly and reasonably conveyed to them by the language of plaintiff's agent." Defendants assign the refusal to give this instruction as error. The Court on its own motion instructed the jury that, "If the language used by plaintiff's general agent in making the arrangement with defendants was ambiguous, or fairly admitted of more than one construction, that meaning is to be given in which they were understood by defendants, provided plaintiff's said general agent had reason to believe they were so understood by defendants." Omitting the qualification expressed in the last clause, this instruction presents the rule which is embodied in the instruction asked. With the qualification, however, it presents a very different rule. Under the instruction as given, defendants would be liable if they adopted and acted on a construction of the instructions of which they were fairly capable, but which was different from which was actually intended by the agent, and he did not know that they had adopted such wrong construction. This, it seems to us, would be to make the innocent party suffer for the wrong or negligence of another. If the instructions were "ambiguous, or fairly admitted of more than one construction," this was the fault or negligence of the party who gave them, and that party ought in justice to bear the consequence of such negligence, rather than the one who was deceived and misled by it. We think, therefore, that the instruction should have been given without the qualification: *Vianna v. Barclay*, 3 Cow. 281.

III. After Valentine had ceased to purchase flaxseed for plaintiff, and after defendants had paid for all that he had purchased, and had also paid him the money in question in this case, they sent plaintiff a written statement of their account, showing the amounts received and disbursed by them, together with a draft for the amount which was due plaintiff according to the statement, and the checks or tickets on which the disbursements had been made. The amount in controversy had been paid Valentine on tickets which showed

on their face that the payments were made on account of his commissions. These tickets were sent by defendants with the statement and the other vouchers. Plaintiff's book-keeper received these papers and the remittances in due course of mail, and wrote defendants acknowledging the receipt thereof; and no question was made as to the payment to Valentine of his commissions for about four months from the time the remittance and vouchers were received by plaintiff. The book-keeper testified that when he received the statement of account and vouchers he placed them in a safe, where they remained, without being examined or compared, for four months. They were then examined by Harkness, the agent who made the arrangement originally with defendants, and, when it was discovered that the payments had been made to Valentine, this suit was instituted.

The defendants requested the Court to give the following instruction: "If the defendants were employed by the plaintiff to disburse plaintiff's money under plaintiff's instructions, and afterward, when the business was supposed to be closed, the defendants wrote a letter and sent a full statement to plaintiff of their doings, as such disbursing agents, it was plaintiff's duty, as defendants' principal, to examine said report in reasonable time, and, if it disapproved of defendants' acts, to answer the letter, or otherwise notify defendants, expressing its dissent; and, if plaintiff failed to do so in a reasonable time after receiving their report, plaintiff will be deemed to approve the acts of defendants as its agents, and silence would amount to a ratification of the acts so reported." The Court refused to give this instruction; but, as the same doctrine is fairly expressed in one of the instructions given by the Court on its own motion, defendants have no ground of exception because of such refusal. But the Court, in addition to the instruction just referred to, gave the following: "Before a principal is bound by the unauthorized act of an agent, it must appear that a full knowledge of the act done by the agent has come to the principal, and that the principal has, either expressly or by unreasonable delay in making objec-

tions thereto, ratified the same. If the objection was not made in a reasonable time after knowledge of the act, the act is thereby ratified. What constitutes reasonable time in such cases depends upon the nature and character of the matter to which the time relates, and the circumstances attendant upon or surrounding the persons and transactions involved, the ordinary course of business between the parties, and the customs of trade and business to which the matter to be ratified relates. A reasonable time is such as an ordinarily reasonable and prudent person, under the same or similar circumstances, would deem it necessary and proper to act in; and a failure to so act in such reasonable time is unreasonable delay. The jury must determine, if they find that the payments in controversy were not prior thereto authorized by plaintiff, whether such payments were brought to plaintiff's knowledge afterward, and, if so, whether they were objected to by plaintiff, with notice thereof to defendants, within a reasonable time after knowing of the payments." The giving of this is assigned as error.

In the former instruction, the jury are told in effect that, if plaintiff failed to object to the payments to Valentine within a reasonable time after the statement and vouchers were sent to it by defendants and received by it, its delay in this respect should be treated as a ratification of the payments, and would defeat a recovery; while the doctrine of the latter instruction is that such silence would not amount to a ratification of the payments, unless it had full knowledge at the time that they had been made. These propositions are inconsistent. Plaintiff did not have full knowledge that the payments had been made until the statements of account and vouchers were examined and compared by Harkness, which was four months after it received them. And we think that, while the latter instruction may be correct as an abstract proposition, it requires some qualification to make it applicable to the facts of this case. When plaintiff received the statement of account and vouchers, it knew, of course, to what they related. It was entitled to a reasonable time after their receipt within which

to examine and compare them. But, if it neglected to do this within a reasonable time, its neglect in this respect ought to be treated as amounting to a ratification of what has been done. When defendants sent the statement of account, they had the right to expect that it would receive attention within a reasonable time, and that what they had done would be disapproved, if at all, within such time. What would be a reasonable time is, of course, a question of fact for the jury, as we held on the former appeal. But if plaintiff neglected to examine and compare the account and disapprove these payments within a reasonable time, it ought not to be heard to say that it was not fully informed as to the facts, and that its silence for that reason should not be treated as amounting to a ratification of said payments: *Story Ag.*, § 258; *Bell v. Cunningham*, 3 Pet. 69; *Cairnes v. Bleecker*, 12 John. 300; *Vianna v. Barclay*, 3 Cow. 281.

For the errors pointed out the judgment of the District Court is reversed, and the cause will be remanded for a new trial.

Reversed.

Mechem, 484; *Vianna v. Barclay*, 3 Cow. 281; *Bessent v. Harris*, 63 N. C. 542; *National Bank v. Merchants' Bank*, 91 U. S. 92.

4

WHEN AUTHORITY IS OF A CERTAIN KIND.

To Sell Personal Property.

Mere possession of property does not confer authority to sell it.

Levi v. Booth, 58 Md. 305.

A clerk behind the counter is authorized to receive payment at the time of sale.

Hirshfield v. Waldron, 54 Mich. 649.

But the mere possession of a bill, though the bill is made out on the principal's billhead, does not imply this authority.

Hirshfield v. Waldron, 54 Mich. 649; *Kornemann v. Monaghan*, 24 Mich. 36.

A traveling salesman has no implied authority to sell his samples.

Kohn *v.* Washer, 64 Tex. 131.

An agent enjoying authority to sell the goods in his possession has the implied authority to warrant their being of the quality and condition of similar property so sold.

Ahern *v.* Goodspeed, 72 N. Y. 103; Pickert *v.* Marston, 68 Wis. 465; Deering *v.* Thom, 29 Minn. 120; Aster *v.* Micklet, 35 Minn. 245.

To Sell Real Estate.

The presumption is always in favor of a cash sale, so one authorized to sell cannot sell on credit.

Carson *v.* Smith, 5 Minn. 78.

One authorized to sell can receive as much of the purchase price as is to be paid down, but one authorized to execute a contract of sale enjoys no such authority.

Mann *v.* Robinson, 19 W. Va. 49.

A power to sell does not carry with it a power to mortgage.

Jeffrey *v.* Hursh, 49 Mich. 31.

An authority to sell real estate in lots "as surveyed" does not authorize the sale of the whole tract for a gross sum.

Rice *v.* Tavernier, 8 Minn. 248.

One authorized to make the purchase price payable at a certain time cannot make it payable on or before that time.

Jackson *v.* Badger, 35 Minn. 52.

An authority to sell land "immediately" does not authorize a future sale.

Matthews *v.* Sowle, 12 Neb. 398.

The authority to sell real estate carries with it the authority to execute all instruments necessary to complete the sale.

Ballantine *v.* Piper, 22 Pick. 85; Farnham *v.* Thompson, 34 Minn. 330.

To Make and Indorse Commercial Paper.

This authority is always strictly construed and can only be conferred by the use of the clearest terms.

Bickford v. Menier, 107 N. Y. 490; *Rossiter v. Rossiter*, 8 Wend. 494; *Turner v. Keller*, 66 N. Y. 66; *Webber v. Williams College*, 23 Pick. 302.

An authority to make and indorse paper to a certain amount will be limited to that amount, and if permitted with one banking house it will not impliedly extend to others.

Citizens' Savings Bank v. Hart, 32 La. An. 22.

An authority to issue bonds does not carry with it an implied authority to issue commercial paper.

School Directors v. Steppe, 54 Ill. 287.

Authority to Purchase.

One authorized to purchase on credit has no implied authority to bind his principal on notes issued in payment for the purchases.

Webber v. Williams College, 23 Pick. 302.

One authorized to purchase a specific thing can exercise no discretion.

Davies v. Lyon, 36 Minn. 427.

One intrusted with *funds* to make a purchase cannot purchase on credit, and if instructed to buy within certain limits he must buy within those limits.

Komorowski v. Krumdick, 56 Wis. 23; *Olyphant v. McNair*, 41 Barb. 446.

Authority to Receive Payment.

One authorized to collect and receive payment cannot compromise the claim.

Woodbury v. Larned, 5 Minn. 339; *Robinson v. Anderson*, 106 Ind. 152; *Baird v. Randall*, 58 Mich. 175.

The agent has implied authority to give the debtor such receipt as he is entitled to in law.

Padfield v. Green, 85 Ill. 529.

If securities are left in the hands of an agent an implied authority arises to receive payment on them, except that, when the security consists in a note to the principal's order undorsed by him, no such implied authority arises.

Purdy v. Huntington, 42 N. Y. 334; *Cooley v. Willard*, 34 Ill. 68.

An authority to negotiate the contract does not carry with it authority to receive payment under the contract.

Thompson v. Elliott, 73 Ill. 221.

One authorized to receipt for the interest is not authorized to receipt for the principal.

Doubleday v. Cross, 50 N. Y. 410.

C

MANNER OF EXECUTION.

1

IN GENERAL.

The execution must be such as the authority demands, and where there has been a complete execution of authority and something more added not authorized, the execution is good and only the excess void; but when there is not a complete execution of authority, or where the lines between the authorized act and the excess are not distinguishable, the whole is bad.

THOMAS *v.* JOSLIN.

Supreme Court of Minnesota, 1883.

30 Minn. 388.

BERRY, J. This action is brought to enforce specific performance of an agreement to sell and convey certain land, alleged to have been executed by Whitney, as agent of defendant, by whom the land was owned.

1. As to the fact of agency, we are of opinion that the letters introduced upon the trial, and which compose all the evidence in the premises, constitute Whitney defendant's agent to sell the land for \$2,500 cash, subject to Miller's lease, and for

a compensation of \$50. They do not purport to be a contract directly with the plaintiff, the alleged vendee, to sell to him, but an authority to Whitney to enter into a contract of sale with some one.

2. The seal which Whitney affixed to the agreement was unauthorized, because Whitney's authority to sell was not under seal; but it may be rejected as a separable excess of authority, and the agreement stand as a simple contract: *Dickerman v. Ashton*, 21 Minn. 538; *Long v. Hartwell*, 34 N. J. Law, 116; *Lawrence v. Taylor*, 5 Hill, 107.

3. The agreement executed assumes to bind defendant to convey the land "in fee simple, and with a perfect title, free from all incumbrances." This is in excess of the authority conferred upon Whitney to make a sale subject to the Miller lease. "Where there is a complete execution of a power, and something *ex abundanti* added, which is improper, there the execution shall be good, and only the excess void; but where not a complete execution of a power, where the boundaries between the excess and execution are not distinguishable, it will be bad:" *Alexander v. Alexander*, 2 Ves. 640, 644; *Ewell's Evans on Agency*, 170; *Story on Agency*, §§ 165-168; *Sugden on Powers*, c. 9, § 2. The instrument executed by Whitney is not an agreement for a sale and conveyance subject to the Miller lease, with something superadded in excess of Whitney's authority, in which case the excess might be rejected, and the rest of the agreement sustained. But the thing ostensibly contracted for is entirely different from that authorized, and therefore the purported agreement is not "a complete execution of the power," and, by consequence, not the agreement of Whitney's constituent, the defendant. Upon the facts as they now appear, the agreement is, therefore, under the rule above enunciated, bad and not enforceable.

Order affirmed.

Alexander v. Alexander, 2 Ves. 640; *Mechem*, 416; *Story*, 165-168; *Sugden on Powers*, ch. 9, § 2; *Dickerman v. Ashton*, 21 Minn. 538; *Long v. Hartwell*, 34 N. J. L. 116; *Lawrence v. Taylor*, 5 Hill, 107; *Reed v. Seymour*, 24 Minn. 273.

2

SPECIALTIES.

In the execution of sealed instruments they should be made, signed, and sealed in the name of the principal.

BRINLEY *v.* MANN.

Supreme Judicial Court of Massachusetts, 1848.

2 Cush. 337.

METCALF, J. The demanded premises were formerly the property of the New England Silk Company, a body corporate, and the demandants claim title thereto under levies of two executions against that company. We see no valid objection to either of those levies. The delay in completing the levy of the first execution was warranted by the Rev. Sts. c. 97. The appraisement of the undivided fractional part of the estate, which was set off on the second execution, was all that the law required of the appraisers. The objections to these levies were therefore rightly overruled by the Judge at the trial, and he rightly instructed the jury that the demandants had a *prima facie* title to the premises demanded in this suit.

The tenant also claims title under the Silk Company, through two deeds made to James B. Colt before the demandants levied upon or attached the demanded premises, and a deed from Colt to Humphrey, who was the tenant's immediate grantor. On examining the deeds to Colt, we are of opinion that they conveyed no title to him. It is a rule of conveying, long established, that deeds which are executed by an attorney or agent must be executed in the name of the constituent or principal. In Combes's Case, 9 Co. 76 b, it was resolved "that when any has authority, as attorney, to do any act, he ought to do it in his name who gives the authority; for he appoints the attorney to be in his place and to represent his person, and therefore the attorney cannot do it in his own name nor as his proper act, but in the name and as the act of

him who gives the authority." And in *Fowler v. Shearer*, 7 Mass. 19, PARSONS, C. J., says: "It is not enough for the attorney, in the form of the conveyance, to declare that he does it as attorney; for he being in the place of the principal, it must be the act and deed of the principal, done and executed by the attorney in his name." This doctrine, which was applied in *Elwell v. Shaw*, 16 Mass. 42, and in other cases cited by the demandants' counsel, and also in *Berkeley v. Hardy*, 8 Dowl. & Ryl. 102, must be applied to the deeds now before us. Both of these deeds were executed by C. Colt, Jr., in his own name, were sealed with his seal, and were acknowledged by him as his acts and deeds. In one of them, it is true, he declared that he acted in behalf of the company and as their treasurer; and in the other he declared himself to be their treasurer and to be duly authorized for the purpose of executing it. But this, as we have seen, was "not enough." He should have executed the deeds in the name of the company. He should also have affixed to them the seal of the company, and have acknowledged them to be the deeds of the company: 1 Crabb on Real Property, §§ 703, 705; 4 Kent Com. (3d ed.) 451; *Stinchfield v. Little*, 1 Greenl. 231; *Savings Bank v. Davis*, 8 Conn. 191; 3 Stewart on Conveyancing, 189. If the deeds had been rightly executed in other respects, the seal which C. Colt, Jr., affixed to each of them—namely, a wafer and a paper, without any stamp or impression—might have been regarded as the seal of the company, according to the decisions in *Mill Dam Foundry v. Hovey*, 21 Pick. 417, and *Reynolds v. Glasgow Academy*, 6 Dana, 37.

The case of *Warner v. Mower*, 4 Verm. 385, cited by the tenant's counsel, was decided upon a statute of Vermont, which authorizes certain corporations to convey real estate by a deed of their president, sealed with his seal. The Court, in that case, admitted that "the form of the deed, at common law, would not, probably, be considered good."

As nothing passed to James B. Colt by the deeds of October, 1844, and June, 1845, he could not convey any title to Humphrey nor Humphrey to the tenant. We therefore need not

examine the other objections to the tenant's title, which were raised and argued by the counsel for the demandants.

Judgment on the verdict.

4 Kent Comm. (3d Ed.), 451; *Stinchfield v. Little*, 1 Greenl. (Me.) 231; *Savings Bank v. Davis*, 8 Conn. 191; *Mill Dam Foundry v. Hovey*, 21 Pick. 417; *Mechem*, 419.

3

SIMPLE CONTRACTS.

In the execution of simple contracts the agent should not only name the principal but he must express by some form of words that the writing is the act of the principal.

TUCKER MFG. CO. *v.* FAIRBANKS.

Supreme Judicial Court of Massachusetts, 1867.

98 Mass. 101.

CONTRACT against David Fairbanks & Co. as drawers of the following bill of exchange: "Boston, March 23, 1866. \$4,469.76. Two months after date pay to the order of Messrs. Hiram Tucker & Co. \$4,469.76, value received, and charge the same to account of

"David Fairbanks & Co.,

"Agts. Piscataqua F. & M. Ins. Co.

"To Piscataqua F. & M. Ins. Co., So. Berwick, Me."

Across the face of the draft was written, "Accepted for the Treasurer, David Fairbanks, President;" and on the back, "Payable in Boston, Hiram Tucker & Co."

Trial by jury was waived, and the case heard by FOSTER, J., who found the following facts: The signatures of all the parties to the bill were proved or admitted. It was actually made and delivered to the officers of the plaintiff corporation, and accepted by them on the 3d of April, 1866, in payment and satisfaction of the amount of a loss by fire, due on a policy of insurance effected by Hiram Tucker & Co. in the Piscataqua Fire and Marine Insurance Company, which had been ascertained on the 23d of March, and was payable sixty days afterward, and

had been assigned by Hiram Tucker & Co. to the plaintiffs on the 26th of March. The plaintiffs had full knowledge of all the circumstances under which the bill was made. The insurance company, at the time of delivering it, took from the plaintiffs' treasurer this receipt: "Piscataqua Fire and Marine Ins. Co., Treasurer's Office, So. Berwick, Me., April 3, 1866. \$4,469.76. Received of the Piscataqua Fire and Marine Insurance Company \$4,469.76, in full for loss and damage to my property by fire on the 19th of March, 1866, insured by policy No. 16,907 in said company. Tucker Manufacturing Co. R. S. Fay, Treas."

No evidence was offered of any fraud attending the making of the bill. The defendants offered parol evidence tending to show that it was not expected or intended that they should be liable on the bill, that it was given only to settle the loss, and was supposed and expected by both parties to create a debt against no one but the insurance company. But the Judge excluded such evidence, and held that the question of the defendant's liability must be determined by the instrument itself.

The insurance company were a corporation established by the laws of Maine, having their office at South Berwick in that State. The bill was never presented to them there for acceptance, and no regular notice of its non-payment was given to the defendants. The defendants had no funds in the hands of the insurance company when the bill was made or ever afterward. It was proved that the draft was made and delivered in Boston at the office of the defendants, who were the general agents of the insurance company, and one of them, David Fairbanks, its president, and the agent appointed to receive service of process in Massachusetts, under the Gen. Sts. c. 58, § 68; that at the time of its execution one of the defendants was asked where it would be paid, and replied "in Boston," and requested the plaintiff to keep it there and not send it to Maine for collection; that before it came due one of the defendants told the plaintiff that it would not be paid at maturity, but he hoped it would be paid eventually; that on the last day of grace the defendants were informed by the plaintiff that it was in the

Union Bank in Boston, and one of them answered that it would not be paid.

Upon these facts the-presiding Judge found that due presentment and notice had been waived by the defendants; and reserved the question, whether the facts warranted this finding, whether the defendants were liable personally as drawers on the face of the bill, and whether the parol evidence offered by them should be received, for the consideration of the full Court, according to whose opinion judgment was to be entered for the plaintiff, or for the defendant, or a new trial ordered.

GRAY, J. 1. The facts proved at the trial were amply sufficient to warrant the finding that presentment for acceptance and notice of non-payment had been waived. The defendants knew that the bill would not be paid at maturity, and so informed the plaintiffs; and the plaintiffs had the right to rely upon the information so received and omit a useless ceremony which could be of no benefit to themselves or to the defendants: *Brett v. Levett*, 13 East, 213; *Barker v. Parker*, 6 Pick. 80; *Spencer v. Harvey*, 17 Wend. 489.

2. It is equally clear that the liability of the defendants as drawers of a negotiable instrument must be determined from the instrument itself. This is too well settled to admit of discussion. There is no distinction in this respect between the drawer of a bill of exchange and the maker of a promissory note: *Bank of British North America v. Hooper*, 5 Gray, 567; *Bass v. O'Brien*, 12 Gray, 481; *Slawson v. Loring*, 5 Allen, 342; *Barlow v. Congregational Society in Lee*, 8 Allen, 460; *Arnold v. Sprague*, 34 Verm. 402; Met. Con. 108.

3. The question whether the defendants are liable upon the face of the bill requires more consideration. The difficulty is not in ascertaining the general principles which must govern cases of this nature, but in applying them to the different forms and shades of expression in particular instruments. In order to exempt an agent from liability upon an instrument executed by him within the scope of his agency, he must not only name his principal, but he must express by some form of words that the writing is the act of the principal, though done by the hand

of the agent. If he expresses this, the principal is bound, and the agent is not. But a mere description of the general relation or office which the person signing the paper holds to another person or to a corporation, without indicating that the particular signature is made in the execution of the office and agency, is not sufficient to charge the principal or to exempt the agent from personal liability. Amid the great variety of language which may be used by merchants in haste or thoughtlessness, ignorant or unmindful of legal rules, or not anticipating the importance of holding one party rather than the other responsible, it must often happen that cases fall very near the dividing line; and, in order to maintain uniformity of decision, it is necessary for the Court to refer to the cases already adjudicated, especially within its own jurisdiction.

The authority which at first sight seems most strongly to support the position of the defendants is that of *Ballou v. Talbot*, 16 Mass. 461, in which a note signed "Joseph Talbot, agent for David Perry," was held not to bind Talbot personally. That case has since been recognized and followed in this Commonwealth: *Jefts v. York*, 4 Cush. 372; *Page v. Wight*, 14 Allen, 182. But the important and effective word in *Ballou v. Talbot* was not the word "agent," nor the name of the principal, but the connecting word "for," which might indeed indicate merely the relation which the agent held to the principal; but which was equally apt to express the fact that the act was done in behalf of the principal, in the same manner as if the words had been transposed thus: "For David Perry, Joseph Talbot, agent." See *Deslandes v. Gregory*, 2 El. & El. 602. This is made manifest by considering that if the word "agent" had been wholly omitted, and the form of the signature had been simply "Joseph Talbot, for David Perry," or "for David Perry, Joseph Talbot," it would have been well executed as the contract of the principal, even if it had been under seal, and of course not less so in the case of a simple contract: *Long v. Colburn*, 11 Mass. 97; *Emerson v. Providence Hat Manufacturing Co.*, 12 Mass. 237; *Mussey v. Scott*, 7 Cush. 215; *Met. Con.* 105, 110.

On the other hand, in *Hills v. Bannister*, 8 Cowen, 31, a note

signed by two persons, with the addition "Trustees of Union Religious Society, Phelps" (who were a legal corporation), was held to bind the signers personally; and in *Barker v. Mechanic Insurance Co.*, 3 Wend. 94, a note signed "John Franklin, President of the Mechanic Fire Insurance Company," was held on demurrer not to be the note of the company, although alleged to have been made within the authority of the president and the scope of the legitimate business of the corporation; the Court saying: "In this case, there is an averment that the president was lawfully authorized; but it does not appear that he acted under that authority; he does not say that he signs *for the company*; he describes himself as president of the company, but to conclude the company by his acts he should have contracted in their name, or at least on their behalf." The variation between the words "for" and "of" seems at first view slight; but in the connection in which they are used in signatures of this kind the difference is substantial. "Agent of" or "president of" a corporation named simply designates a personal relation of the individual to the corporation. "Agent for" a particular person or corporation may designate either the general relation which the person signing hands to another party, or that the particular act in question is done in behalf of and as the very contract of that other; and the Court, if such is manifestly the intention of the parties, may construe the words in the latter sense. But even "agent for" has been held under some circumstances a mere *descriptio personæ* of the agent, as in *De Witt v. Walton*, 5 Sheldon, 570, in which the name following these words was not the proper name of the principal, but the name of a newspaper which the agent carried on in the principal's behalf, and a note signed "David Hoyt, agent for *The Churchman*," was held to be the note of Hoyt and not of his principal; and in *Shattuck v. Eastman*, 12 Allen, 369, in which it was held that a paper in the form of a receipt, signed "Robert Eastman, Agent for Ward 6, Lowell, Mass.," if executed under such circumstances as to amount to a contract, might be binding on the agent personally. In *Fiske v. Eldridge*, 12 Gray, 474, in

a careful review of the cases by Mr. Justice DEWEY, the New York decisions above mentioned were quoted with approval, and a note signed "John T. Eldridge, Trustee of Sullivan Railroad," was held to be the personal note of Eldridge. In *Haverhill Insurance Co. v. Newhall*, 1 Allen, 130, a note signed "Cheever Newhall, President of the Dorchester Avenue Railroad Company," was held to bind Newhall personally, although given by him to an insurance company (as was expressed in the note itself) in consideration of a policy issued to the railroad corporation, which he was in fact authorized to obtain and sign the note for. See, also, *Fullam v. West Brookfield*, 9 Allen, 1; *Morell v. Coddington*, 4 Allen, 403; *Tanner v. Christian*, 4 El. & Bl. 591; *Parker v. Winslow*, 7 El. & Bl. 942; *Price v. Taylor*, 5 H. & N. 540; *Bottomley v. Fisher*, 1 H. & C. 211.

This case is not distinguishable from those just stated. It differs from *Ballou v. Talbot*, in omitting the word "for" (the only evidence, contained in the note there sued on, that it was made in behalf of the principal), leaving the words "Agts. Piscataqua F. & M. Ins. Co." as a mere description of the persons signing this bill. The cases of *Mann v. Chandler*, 9 Mass. 335; *Despatch Line of Packets v. Bellamy Manufacturing Co.*, 12 N. H. 205, and *Johnson v. Smith*, 21 Conn. 627, cannot avail the defendants against the later decisions of this Court. See 12 Gray, 476; 8 Allen, 461, 462. The name of the principal does not appear in the body of the bill. The address of the bill to the corporation and the request to them to charge the amount to the account of the drawers have certainly no tendency to show that the drawers are the same as the corporation, the drawees. The fact that the bill was delivered to the plaintiffs by the insurance company, as shown by the contemporaneous receipt, does not make it the less the promise of the signers. The defendants must therefore be held personally responsible as the drawers of the bill.

Judgment for the plaintiffs.

Pratt v. Beaupre, 13 Minn. 187; *Fowler v. Atkinson*, 6 Minn. 578; *Mayhew v. Prince*, 11 Mass. 54; *New Market Savings Bank v. Gillet*, 100 Ill. 254.

III

OF THE RIGHTS AND DUTIES OF THE PARTIES TO THE CONTRACT.

A

DUTIES OF THE AGENT TO THE PRINCIPAL.

1

GOOD FAITH.

The agent owes good faith to his principal.

HEGENMYER *v.* MARKS.

Supreme Court of Minnesota, 1887.

37 Minn. 6.

GILFILLAN, C. J. The plaintiff owned a lot of land in Minneapolis. One Creigh was a real estate broker, and at his request she employed and authorized him to sell the lot to any one who would purchase it at such sum as would net her \$1,050, Creigh to receive as his compensation whatever he could get for the lot in excess of \$1,050. At the time of such employing he (believing it to be true) represented to her, and she believed, that \$1,050 was the fair market value of the lot. Both of them supposed the lot to be entirely vacant; but a third person, owning the adjoining lot, had by mistake constructed on her lot, thinking it was his, a valuable house and barn in such manner that they were part of the realty. Neither plaintiff nor Creigh knew anything of this at the time of employing. With the buildings the lot was worth over \$3,000. Creigh learned of it before making a sale, but did not disclose it to plaintiff. He sold the lot to defendant for \$1,150, the latter knowing of the buildings on the lot and knowing that Creigh knew and that plaintiff was ignorant

of the fact. Of the \$1,150, \$450 was paid in cash—plaintiff receiving \$350 and Creigh \$100—and \$700 was secured by defendant's note to plaintiff and his mortgage on the lot. Upon learning of the facts plaintiff tendered to defendant the \$350, with interest, and the note and mortgage, and demanded a reconveyance of the lot, which defendant refused. The action is to rescind the sale and conveyance. The Court below decided in favor of plaintiff.

The decision of the Court below proceeds on the propositions: *First*, that it was the duty of Creigh, upon learning of the buildings being upon the lot, to communicate that fact to plaintiff, and that by selling the lot without disclosing that fact, at a price which he knew she had put upon it in ignorance of that fact, he committed a fraud upon her; and, *second*, that defendant, by purchasing with notice of Creigh's fraud, became a party to it. If the first proposition be correct the second follows as a necessary consequence.

The case turns upon whether it was the duty of Creigh, before making a sale, to disclose what he had learned to his principal. Upon this contract of agency my brethren are of opinion (though it is not mine) that when Creigh learned a fact affecting the value of the property, and of which fact he knew she was ignorant when she fixed the price, and if he had reason to believe that, had she known the fact, she would have fixed a higher price (as in this case she undoubtedly would), then good faith toward his principal required of him, and it was his legal duty, to disclose the fact to her before he proceeded to sell, so that she might, if so disposed, fix the selling price in accordance with the actual condition of things. This being so, his selling upon the basis of the price first fixed, without disclosing to her the fact he had learned was of course a fraud on her.

The tender was sufficient. Defendant and Creigh were parties to the fraud on plaintiff, by which Creigh, one of the parties, received (in effect) from defendant, the other party to it, \$100. No consideration of equity or morality would require of the plaintiff to make that good either to Creigh or

defendant. All that can be required of her as a condition of her repudiating the transaction imposed on her by the fraud of Creigh and defendant is to restore what (in ignorance of the facts) she received in the transaction.

Judgment affirmed.

Cock v. Van Etten, 12 Minn. 522; *Farrand v. Hurlbut*, 7 Minn. 477; *Rose v. Hayden*, 35 Kan. 106; *Friesenhahn v. Bushnell*, 47 Minn. 443; *Russell v. Bradley*, 47 Kan. 438; *Geisinger v. Beyl*, 80 Wis. 443.

2

OBEDIENCE TO INSTRUCTIONS.

The agent must obey all lawful instructions.

LAVERTY v. SNETHEN.

New York Court of Appeals, 1877.

68 N. Y. 522.

CHURCH, C. J. The defendant received a promissory note from the plaintiff made by a third person and indorsed by the plaintiff, and gave a receipt therefor, stating that it was received for negotiation, and the note to be returned the next day or the avails thereof. The plaintiff testified in substance that he told the defendant not to let the note go out of his reach without receiving the money. The defendant, after negotiating with one Foote about buying the note, delivered the note to him under the promise that he would get it discounted, and return the money to defendant, and he took away the note for that purpose. Foote did procure the note to be discounted, but appropriated the avails to his own use.

The Court charged that if the jury believed the evidence of the plaintiff in respect to instructing the defendant not to part with the possession of the note, the act of defendant in delivering the note, and allowing Foote to take it away, was a conversion in law, and the plaintiff was entitled to recover. The exception has been criticised as applying to two propositions, one of which was unobjectionable, and therefore not available.

Although not so precise as is desirable, I think that the exception was intended to apply to the proposition above stated, and was sufficient.

The question as to when an agent is liable in trover for conversion is sometimes difficult. The more usual liability of an agent to the principal is an action of *assumpsit* or what was formerly termed an action on the case for neglect or misconduct, but there are cases when trover is the proper remedy. Conversion is defined to be an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights. A constructive conversion takes place when a person does such acts in reference to the goods of another as amount in law to appropriation of the property to himself. Every unauthorized taking of personal property, and all intermeddling with it, beyond the extent of the authority conferred, in case a limited authority has been given, with intent so to apply and dispose of it as to alter its condition or interfere with the owner's dominion, in a conversion: Bouv. Law Dict., title Conversion.

SAVAGE, C. J., in *Spencer v. Blackman*, 9 Wend. 167, defines it concisely as follows: "A conversion seems to consist in any tortious act by which the defendant deprives the plaintiff of his goods."

In this case the plaintiff placed the note in the hands of the defendant for a special purpose not only, but with restricted authority (as we must assume from the verdict of the jury), not to part with the possession of the note without receiving the money. The delivery to Foote was unauthorized and wrongful, because contrary to the express directions of the owner. The plaintiff was entitled to the absolute dominion over this property as owner. He had the right to part with so much of that dominion as he pleased. He did part with so much of it as would justify the defendant in delivering it for the money in hand, but not otherwise. The act of permitting the note to go out of his possession and beyond his reach was an act which he had no legal right to do.

It was an unlawful interference with the plaintiff's property which resulted in loss, and that interference and disposition constituted, within the general principles referred to, a conversion, and the authorities I think sustain this conclusion, by a decided weight of adjudication. A leading case is *Syeds v. Hay*, 4 T. R. 260, where it was held that trover would lie against the master of a vessel who had landed goods of the plaintiff contrary to the plaintiff's orders, though the plaintiff might have had them by sending for them and paying the wharfage. BUTLER, J., said: "If one man who is intrusted with the goods of another put them into the hands of a third person, contrary to orders, it is a conversion." This case has been repeatedly cited by the Courts of this State as good law, and has never to my knowledge been disapproved, although it has been distinguished from another class of cases upon which the defendant relies, and which will be hereafter noticed. In *Spencer v. Blackman*, 9 Wend. 167, a watch was delivered to the defendant to have its value appraised by a watchmaker. He put it into the possession of the watchmaker, when it was levied upon by virtue of an execution not against the owner, and it was held to be a conversion. SAVAGE, C. J., said: "The watch was intrusted to him for a special purpose, to ascertain its value. He had no orders or leave to deliver it to Johnson, the watchmaker, nor any other person." So, when one hires a horse to go an agreed distance, and goes beyond that distance, he is liable in trover for a conversion: *Wheelock v. Wheelwright*, 5 Mass. 103. So when a factor in Buffalo was directed to sell wheat at a specified price on a particular day, or ship it to New York, and did not sell or ship it that day, but sold it the next day at the price named, held that in legal effect it was a conversion: *Scott v. Rogers*, 31 N. Y. 676; see, also, Addison on Torts, 310, and cases there cited. The cases most strongly relied upon by the learned counsel for the appellant are *Dufresne v. Hutchinson*, 3 Taunt. 117, and *Sarjeant v. Blunt*, 16 J. R. 73, holding that a broker or agent is not liable in trover for selling property at a price below instructions. The distinction in the two

classes of cases, I apprehend, is that in the latter the broker or agent did nothing with the property but what he was authorized to do. He had a right to sell and deliver the property. He disobeyed instructions as to price only, and was liable for misconduct, but not for conversion of the property, a distinction which, in a practical sense, may seem technical, but is founded probably upon the distinction between an unauthorized interference with the property itself, and the avails or terms of sale. At all events, the distinction is fully recognized and settled by authority. In the last case *SPENCER, J.*, distinguished it from *Syeds v. Hay*, *supra*. He said: "In the case of *Syeds v. Hay*, 4 Term R. 260, the captain disobeyed his orders in delivering the goods. He had no right to touch them for the purpose of delivering them on that wharf."

The defendant had a right to sell the note, and if he had sold it at a less price than that stipulated, he would not have been liable in this action, but he had no right to deliver the note to Foote to take away, any more than he had to pay his own debt with it. Morally, there might be a difference, but in law both acts would be a conversion, each consisting in exercising an unauthorized dominion over the plaintiff's property. *Palmer v. Jarman*, 2 M. & W. 282, is plainly distinguishable. There, the agent was authorized to get the note discounted, which he did, and appropriated the avails. *PARKE, B.*, said: "The defendant did nothing with the bill which he was not authorized to do." So in *Cairnes v. Bleecker*, 12 J. R. 300, where an agent was authorized to deliver goods on receiving sufficient security, and delivered the goods on inadequate security, it was held that trover would not lie, for the reason that the question of the sufficiency of the security was a matter of judgment. In *McMorris v. Simpson*, 21 Wend. 610, *BRONSON, J.*, lays down the general rule that the action of trover "may be maintained when the agent has wrongfully converted the property of his principal to his own use, and the fact of conversion may be made out by showing either a demand and refusal, or that the agent has without necessity sold or otherwise disposed of the property

contrary to his instructions. When an agent wrongfully refuses to surrender the goods of his principal, or wholly departs from his authority in disposing of them, he makes the property his own and may be treated as a *tort-feasor*." The result of the authorities is that if the agent parts with the property, in a way or for a purpose not authorized, he is liable for a conversion, but if he parts with it in accordance with his authority, although at less price, or if he misapplies the avails, or takes inadequate for sufficient security, he is not liable for a conversion of the property, but only in an action on the case for misconduct. It follows that there was no error in the charge. The question of good faith is not involved. A wrongful intent is not an essential element of the conversion. It is sufficient if the owner has been deprived of his property by the act of another assuming an unauthorized dominion and control over it: 31 N. Y. 490. It is also insisted that the parol evidence of instructions not to part with the note was incompetent to vary the terms of the contract contained in the receipt. This evidence was not objected to not only, but the point was not taken in any manner. The attention of the Court was not called to it, and the Court made no decision in respect to it. Under these circumstances it must be deemed to have been waived, and is not available upon appeal. But if an exception had been taken, I am inclined to the opinion that the testimony was competent. It is not claimed that it varies that part of the receipt which contains an agreement to return the note or the money the next day, but that it varies the clause stating that the note was received for negotiation. This expresses the purpose of receiving the note, and if deemed a contract, can it be said that a parol mandate not to part with possession of the note before sale and receipt of money is inconsistent with it?

There is no rule of law which gives an agent the right thus to part with a promissory note under the mere authority to negotiate. The instructions were consistent with the purpose expressed, although if they had not been given, a wider field of inquiry might have been opened. A promissory note

passes from hand to hand, and a *bona fide* holder is protected in his title, and it might well be claimed that an authority to sell would not ordinarily justify a delivery to a third person without a sale. Without definitely passing upon this question, we think that the question should have been in some form presented at the trial. In a moral sense the defendant may have acted in good faith, and hence the judgment may operate harshly upon him, but the fact found by the jury renders him liable in this action.

The judgment must be affirmed.

Spencer v. Blackman, 9 Wend. 167; Scott v. Rogers, 31 N. Y. 676; Nichols v. Wadsworth, 40 Minn. 547.

3

DUE CARE.

The agent must exercise due care in the discharge of his duties.

WHITNEY v. MARTINE.

New York Court of Appeals, 1882.

88 N. Y. 535.

MILLER, J. This action was brought to recover a sum of money which it is claimed the defendant's testator invested upon bond and mortgage as agent and attorney of the plaintiff upon real estate in the city of New York which was incumbered by prior mortgages, and which was sold for a less amount than said mortgages, by means of which the investment was a loss to the plaintiff. The order of reversal does not provide that the judgment was reversed on questions of fact, and hence the only questions we are called upon to consider upon this appeal are questions of law.

The first question which properly arises is whether the evidence upon the trial was sufficient to support the findings and the judgment of the Court. There is proof to show that the

testator acted in the capacity of agent and attorney in making the loan. The answer admits that he negotiated and procured to be accepted the loan which was made upon the terms and conditions therein stated and referred to. It appears that the testator came with the plaintiff to the place where, and at the time when, the money was paid to her upon another mortgage, made out the statement as the amount, brought a satisfaction-piece of the mortgage with him for which he was paid, received the money which was paid for the plaintiff, and acted or seemed to act on her behalf as her attorney in the transaction of the business in preference to the plaintiff's former attorney with whom it had previously been transacted. It was also proved that the plaintiff subsequently, by the request of the testator, was at his and his son's office to close up the business, delivered the check for the money to him, was introduced to the son, but said nothing to him whatever about the title of the lots or the business. A week afterward the testator delivered the bonds and mortgages to her, and paid her \$300 as a present, as the plaintiff testifies and claims. The testator afterward collected a small amount on the bonds and mortgages, and wrote several letters to the bondsmen demanding payment of interest and taxes. Although there was a contradiction in this testimony in regard to the testator's relation to the plaintiff, it was sufficient, nevertheless, to warrant the conclusion that the testator was intrusted by the plaintiff with making the loan, and the duty devolved upon him to see that the money was safely and securely invested. The responsibility of an agent or attorney under such circumstances is beyond dispute, and the rule is well settled that the agent is not only bound to act in good faith, but to exercise reasonable diligence and such care and skill as is ordinarily possessed by persons of common capacity engaged in the same business: Story on Agency, 183; *Heinemann v. Heard*, 50 N. Y. 35; Story's Eq. Juris., § 310. When the relations of contracting parties are such that they do not deal on terms of equality, a very strict rule prevails, and an agent or trustee who occupies such a position has no right to avail himself of his superior

knowledge of the matter derived from the fiduciary relation, or influence or weakness, dependence or trust, to take an unfair advantage: *Cowee v. Cornell*, 75 N. Y. 99, 100. The testator being the agent or trustee of the plaintiff in making the loan, the next question which properly arises is whether by reason of his failure to perform his duty, or his carelessness and neglect in making the investment, the same was lost to the plaintiff. The Court found upon the trial that the investment was not first class, nor a good and proper one, and proved to be utterly worthless, and decided as a conclusion of law that it was a violation of duty of the testator to invest said money upon property, subject to two prior mortgages of \$10,000 each then existing upon the same, and held the defendants liable for the amount invested. There is, we think, sufficient evidence to sustain this finding. There was testimony showing that the plaintiff had no acquaintance with the mortgaged premises, although it is testified she had examined the premises and knew that there were second mortgages. She denies that, and swears that she did not know that there were second mortgages until a week after the mortgages executed to her were returned to her, and the weight of the evidence is found by the Court to be in her favor. One witness testifies to a statement made in the presence of the testator that he did wrong in making these mortgages second mortgages, which was not denied by him. Although this testimony is not very strong and may perhaps be subject to criticism, yet in connection with the other evidence presented on the trial, as well as the fact that being unaccustomed to business, the plaintiff in all probability had but little knowledge as to the nature of such security, it is a reasonable conclusion that she was not aware of that fact, nor of the exact nature of the security taken.

The proof shows that the value of the property even at the highest estimate placed upon it by the defendants' witness was but a few thousand dollars over the amount of the first mortgages and the plaintiff's loan, and a very inadequate security in case of a change or fluctuation in value or the depreciation of real estate in the locality from any cause. It also appears

that the loan upon the first mortgages was made at an unusually large discount for a good investment, and that a large amount was retained for fees, for examining title and other expenses; that the mortgagors were, or became afterward, insolvent and the property was sold at far less than the amount of the first mortgages. These circumstances all tend to show that the loan was improvidently and improperly made, and unsafe and insecure at the start. Perhaps it might not be sufficient to charge the defendant for neglect of duty on the last evidence referred to, and there would be ground for hesitation, independent of the fact that the mortgages of the plaintiff were second mortgages, taken after others of a large amount had been given, and thus would render it necessary for the plaintiff, on an emergency, to raise a large amount to protect a comparatively small sum loaned by her upon the property. Loans, under such circumstances, are always hazardous and doubtful, and, while the attorney or agent may be exonerated, where the party had full knowledge of their existence and the value of the property, it would be a very unsafe rule to hold, as a matter of law, that an agent would be justified without an understanding by the party of the true character of the prior incumbrances, under circumstances like these here presented.

The right of an agent to advance funds on second mortgages or security not of the first class may well be questioned: *McQueen's Appeal Cases*, 236. And, as a general rule, it may properly be laid down that it is not prudent or safe to advance moneys on second mortgages when there are large prior incumbrances, and especially where the personal security of the mortgagor is in any way precarious. Such an investment is not a first-class one. The risk of protecting a small investment by advancing more than three times as much, and quite a large sum for most persons, is far too great to be taken by an agent without his principal being fully aware of the security he is to receive for his money. And as this case is presented upon the evidence, we are brought to the conclusion that the agent exceeded his authority and was chargeable with a want of

proper care and skill in making the investment; and for this neglect he is legally liable for the loss sustained. In regard to a ratification by the plaintiff, we think that the acceptance of some of the money which was due to her was not sufficient to preclude her from asserting her claim. It was without knowledge of the circumstances, and of her right to disaffirm the act, and it cannot, therefore, be held that she is barred from maintaining an action: *Fish v. Miller*, 1 Hoff. Ch. 290, 291. Nor was the \$300 received by the plaintiff, for a purpose not entirely apparent, a ratification or waiver of her right of action.

We are also of the opinion that no tender of the bonds and mortgages was required, or proof thereof prior to judgment. The point does not appear to have been made upon the trial, nor is it presented in any of the requests to find of the defendants' counsel. If a tender was required it could have been made upon the trial, upon the question as to its necessity being raised. The plaintiff in her complaint offered to assign the bonds and mortgages to the testator. If this is a case where an assignment is proper, all has been done which was required from the plaintiff to accomplish that purpose. The several requests to find which were refused have been examined and we are unable to discover any error of the Judge upon the trial in respect to any of them.

The point that provision should have been made in the judgment for the delivery of the bonds and mortgages to the defendants is without force. It relates to the form of the judgment, was not made on the trial or the settlement of the decree, and cannot be raised upon appeal. Besides a distinct offer to do this was made in the complaint, and the judgment may be amended in this respect by an application to the special term of the Supreme Court, to insert therein a provision that the plaintiff, upon being requested, shall assign the bonds and mortgages to the defendants.

For the reason stated the General Term was in error in reversing the judgment, and the order appealed from should be reversed and the judgment of the special term affirmed

without prejudice to the application to the special term to amend the same, with costs.

Order reversed and judgment accordingly.

Stevens v. Walker, 55 Ill. 151; *Milburn Wagon Co. v. Evans*, 30 Minn. 89; *Furber v. Barnes*, 32 Minn. 105.

4

ACCOUNTING.

The agent must account to the principal for all properties coming into his possession by virtue of his agency.

BALDWIN *v.* POTTER.

Supreme Court of Vermont, 1874.

46 Vt. 402.

GENERAL ASSUMPSIT. Plea, the general issue, and trial by the Court, September Term, 1873, ROYCE, J., presiding.

The case was tried upon the following agreed statement of facts:

“The plaintiffs were merchants and partners, residing and doing business at St. Albans, Vt. They employed the defendant to solicit orders for and sell an article known and called ‘prize candy’ on commission. It was the practice of the parties, under said employment, for the defendant to solicit and take orders for said goods, and send such orders to the plaintiffs, who would thereupon send the candy to the parties ordering it, and charge it directly to the purchaser, on the plaintiffs’ books, and for the defendant, when convenient, to make collections in respect thereof for the plaintiffs, receipt therefor, notify the plaintiffs thereof, and pay the amounts collected over to the plaintiffs on demand.

“The defendant entered upon said business; and in November, 1870, and January, 1871, he sent orders for said candy for various parties in the State of New York to the amount of \$103, and afterward, in August and September, 1871, collected the pay for the same as the plaintiffs’ agent.

In November and December, 1870, and February and March, 1871, the defendant sold and sent orders to the plaintiffs from various parties in the State of Massachusetts for said candy to the amount of \$210.52, and afterward, in August and October, 1871, collected pay for the same as the plaintiffs' agent. During the years 1870 and 1871 the defendant sold and sent orders for said candy from various parties in Vermont to the amount of \$215.57, and afterward, in August, September, and October, 1871, collected the pay for the same as the plaintiffs' agent.

"On the delivery of said goods by the plaintiffs they charged the same to the purchasers on their books; and on receiving notice from the defendant of said collections they credited to such purchasers the amounts thereof. The plaintiffs delivered to the defendant four silver dollars and four silver half-dollars as samples of the prizes contained in certain of said prize candy packages, which, with the premium thereon, were of the value of \$6.72, and which the defendant has never returned nor accounted for to the plaintiff. It is agreed that the commission to which the defendant is entitled is equal to and shall be set off against items in the plaintiffs' favor; specification not included in the amounts aforesaid.

"Said prize candies were of three kinds, and were known and called the 'Challenge,' 'Gem,' and 'United States Silver Coin,' and were put up in packages designed to be sold at retail for a certain price per package. Each package, in addition to a quantity of candy, contained a prize of some value; and the inducement to purchase one or more of the packages at retail was the chance of receiving with the candy a prize, some of which were of greater value, and some of less value, than the price paid. The plaintiffs, at St. Albans, put up said candy in packages, with a prize in each package, and put up the packages in boxes containing a certain number thereof. The plaintiffs sold said candy by the box only, and each box of the several kinds contained the same amount of candy and the same prizes, and the prizes contained in each box were

printed on the outside and on printed circulars; and cards were used by the plaintiffs, and the defendant as their agent, in connection with the sale thereof, stating particularly the kind and value of each article contained in the box as a prize; and each purchaser thereof from the plaintiffs was informed and knew the amount of candy and the exact number, value, and kind of articles as prizes contained in each box that he bought; and the plaintiffs knew that such purchasers intended to sell the same at retail, in the vicinity of the place of purchase, and that the prizes would be drawn as hereinbefore stated by the retail purchasers thereof.

“In respect to said business, and in the collection of said money, the defendant acted solely as the agent of the plaintiffs. On the 18th of October, 1871, the plaintiffs demanded of the defendant to account to them for the money collected by him as aforesaid, and said silver coins, and to pay over the amount thereof to them, but the defendant absolutely refused, and ever since hath refused so to do, and has never paid the same nor any part thereof.

“If upon the foregoing facts the Court is of opinion that the plaintiffs are entitled to recover for the sums as stated, which were collected upon sales in the States of New York, Massachusetts, and Vermont, or either of said States, or for said silver coins, judgment shall be rendered for the plaintiffs for such sums, and interest from the date of collection of the money and the date of the delivery of the coin. If the plaintiffs are not entitled to recover in respect of any of said items, then judgment shall be rendered for the defendant to recover his costs.”

An agreement was also made as to some of the provisions of the statutes of New York and Massachusetts relating to offenses against public policy in force at the time of said sales. The Court rendered judgment for the plaintiff, *pro forma*, to recover the full amount claimed, with interest thereon as stipulated, and found that the defendant received said money in a fiduciary capacity and converted the same to his own use, and adjudged, *pro forma*, that the cause of action arose from

the willful and malicious act and neglect of the defendant, and that he ought to be confined in close jail; to all which the defendant excepted.

PIERPOINT, C. J. We do not find it necessary in this case to consider the question as to whether the contract for the sale of the property referred to, by the plaintiffs, to the several persons who purchased it, were contracts made in violation of law, and therefore void or not. This action is not between the parties to those contracts; neither is it founded upon or brought to enforce them. If those contracts were illegal the law will not aid either party in respect to them; it will not allow the seller to sue for and recover the price of the property sold if it has not been paid; if it has been paid, the purchaser cannot sue for and recover it back. The facts in this case show that the purchasers paid the money to the plaintiffs, not to the plaintiffs personally, but to the defendant as the agent of the plaintiffs authorized to receive it. When the money was so paid it became the plaintiffs' money, and when it was received by the defendant as such agent the law, in consideration thereof, implies a promise on the part of the defendant to pay it over to his principals, the plaintiffs; it is this obligation that the present action is brought to enforce; no illegality attaches to this contract. But the defendant insists that, inasmuch as the plaintiff could not have enforced the contracts of sale as between himself and the purchaser, therefore, as the purchaser has performed the contracts by paying the money to the plaintiffs through me, as their agent, I can now set up the illegality of the contract of sale to defeat an action brought to enforce a contract on my part to pay the money that I as agent receive, over to my principal. In other words, because my principal did not receive the money on a legal contract, I am at liberty to steal the money, appropriate it to my own use, and set my principal at defiance. We think the law is well settled otherwise, and the fact that the defendant acted as the agent of the plaintiffs in obtaining orders for the goods does not vary the case: *Tenant v. Elliot*, 1 B. & P. 2;

Armstrong v. Toller, 11 Wheat. 257; *Evans v. City of Trenton*, 4 Zab. (N. J.) 764.

We think the certificate granted by the County Court was properly granted. It has been urged in behalf of the defendant that the zeal with which he has defended this case shows that he intended no wrong; but we think the man who receives money in a fiduciary capacity, and refuses to pay it over, does not improve his condition by the tenacity with which he holds on to it.

Judgment of the County Court affirmed.

Jett v. Hempstead, 25 Ark. 462; *Cooley v. Betts*, 24 Wend. 203; *Gardner v. Ogden*, 22 N. Y. 327; *Lafferty v. Jelley*, 22 Ind. 471.

5

NOTICE.

It is the duty of the agent to notify the principal of all material facts coming to his knowledge within the scope of his agency.

HEGENMYER *v.* MARKS.

Supreme Court of Minnesota, 1887.

37 Minn. 6.

(Reported *ante*, p. 143.)

Callander v. Oelrichs, 5 Bing. (N. C.) 58 (35 Eng. Com. Law, 29); *Arrott v. Brown*, 6 Whart. 9; *Devall v. Burbridge*, 4 Watts & S. 305; *Pinkham v. Crocker*, 77 Me. 563.

B

DUTIES OF AGENT TO THIRD PARTIES.

1

IMPLIED WARRANTY OF AUTHORITY.

One who contracts as agent for another impliedly warrants that he is such agent and that the contract is within the scope of his authority.

KROEGER v. PITCAIRN.

Supreme Court of Pennsylvania, 1882.

101 Pa. St. 311.

THE Birmingham Fire Insurance Company issued a policy of insurance to Kroeger, plaintiff herein, on a stock of merchandise. Pitcairn, defendant herein, who was an agent of the company, wrote the insurance. One of the printed conditions of the policy provided that if petroleum was kept on the premises without written permission in the policy the policy should be void. Plaintiff called defendant's attention to this clause, saying that he was obliged to keep a barrel of petroleum on the premises, and suggested that the fact should be mentioned in the policy; whereupon defendant assured him that so long as only one barrel was kept at a time it was considered general merchandise and not taken notice of in any other way. The stock was burned and the company refused to pay. This action is brought against the agent to recover the amount of the loss sustained.

STERRETT, J. The subject of complaint, in both specifications of error, is the entry of judgment for defendant *non obstante veredicto*. It is contended that upon the facts established by the verdict, judgment should have been entered thereon in favor of plaintiff. The jury were instructed to return a verdict for the amount claimed by him, if they were satisfied the allegations of fact contained in the point presented by him were true. In view of this, the finding in his favor

necessarily implies a verification of the several matters specified in plaintiff's point, and hence it must now be regarded as containing a truthful recital of the circumstances connected with the delivery of the policy and payment of the premium.

The transaction, as therein detailed, clearly amounted to a mutual understanding or agreement between the parties that the stock of merchandise, mentioned in the policy, should include one barrel of carbon oil ; in other words, that the plaintiff should have the privilege of keeping that quantity of oil in connection with and as a part of the stock insured, without thereby invalidating his policy. It is impossible to regard the transaction in any other light. The jury found that plaintiff "took the policy upon the faith" of the representations made by defendant. These representations were not merely expressions of opinion as to the meaning of the policy. On the contrary, the defendant, acting as its agent and assuming authority to speak for the insurance company, asserted without any qualification that when carbon oil was kept as plaintiff was in the habit of keeping it—a single barrel at a time—it was unnecessary to mention the fact in the policy, or otherwise obtain the consent of the company ; that no notice is ever taken of it unless "it is kept in large quantity—say several hundred barrels. In that case, when it is wholesale, it should be mentioned ; but, as long as it is kept, not more than a barrel in the store at a time, it is considered as general merchandise and is not taken notice of in any other way." Such was the language employed by defendant, evidently for the purpose of dispelling any doubt that existed in the mind of the plaintiff and inducing him to accept the policy and pay the premium ; and, to that end at least, it was successful. What was said and done by defendant, in the course of the transaction, amounted to more than a positive assurance that the accepted meaning of the policy was as represented by him. In effect, if not in substance, his declarations were tantamount to a proposition, on behalf of the company he assumed to represent, that if the insurance was effected it should be with the understanding that a barrel of carbon oil was included in and formed

part of the insured stock of merchandise, without being specially mentioned in the policy. The plaintiff doubtless so regarded his declarations, and relying thereon, as the jury has found, accepted the policy on the terms proposed, and thus concluded, as he believed, a valid contract of insurance, authorizing him to keep in stock, as he had theretofore done, a small quantity of carbon oil. It was not until after the property was destroyed that he was undeceived. He then discovered that, in consequence of defendant having exceeded his authority, he was without remedy against the company. Has he any remedy against the defendant, by whose unauthorized act he was placed in this false position? We think he has. If the president or any one duly authorized to represent the company had acted as defendant did, there could be no doubt as to its liability. Why should not the defendant be personally responsible, in like manner, for the consequences, if he, assuming to act for the company, overstepped the boundary of his authority and thereby misled the plaintiff to his injury, whether intentionally or not? The only difference is that in the latter the authority is self-assumed while in the former it is actual; but, that cannot be urged as a sufficient reason why plaintiff, who is blameless in both cases, should bear the loss in one and not in the other. As a general rule, "whenever a party undertakes to do any act as the agent of another, if he does not possess any authority from the principal therefor, or if he exceeds the authority delegated to him, he will be personally liable to the person with whom he is dealing for or on account of his principal." Story on Agency, 264. The same principle is recognized in *Evans on Agency*, *301; *Whart. on Agency*, 524; 2 *Smith's Lead. Cases*, 380, note; 1 *Pars. on Cont.* 67, and in numerous adjudicated cases, among which are: *Hampton v. Speckenagel*, 9 S. & R. 212, 222; *Layng v. Stewart*, 1 W. & S. 222, 226; *McConn v. Lady*, 10 W. N. C. 493; *Jefts v. York*, 10 Cush. 392; *Baltzen v. Nicolay*, 53 N. Y. 467. In the latter case it is said, the reason why an agent is liable in damages to the person with whom he contracts, when he exceeds his authority, is that the party dealing with him is deprived of

any remedy upon the contract against the principal. The contract, though in form that of the principal, is not his in fact, and it is but just that the loss, occasioned by there being no valid contract with him, should be borne by the agent who contracted for him without authority. In *Layng v. Stewart*, *supra*, Mr. Justice HUSTON says: "It is not worth while to be learned on very plain matters. The cases cited show that if an agent goes beyond his authority and employs a person, his principal is not bound, and in such case the agent is bound." The plaintiff in error, in *McConn v. Lady*, *supra*, made a contract, believing he had authority to do so, and not intending to bind himself personally. The jury found he had no authority to make the contract as agent, and this Court, in affirming the judgment, said: "It was a question of fact submitted to the jury, whether the plaintiff in error had authority from the School Board to make the contract as their agent. They found he had not. He was personally liable whether he made the contract in his own name or in the name of his alleged principal. It is a mistake to suppose that the only remedy was an action against him for the wrong. The party can elect to treat the agent as a principal in the contract."

The cases in which agents have been adjudged liable personally have sometimes been classified as follows, viz.: 1st. Where the agent makes a false representation of his authority with intent to deceive. 2d. Where, with knowledge of his want of authority, but without intending any fraud, he assumes to act as though he were fully authorized; and, 3d. Where he undertakes to act, *bona fide* believing he has authority, but in fact has none, as in the case of an agent acting under a forged power of attorney. As to cases fairly brought within either of the first two classes there cannot be any doubt as to the personal liability of the self-constituted agent; and his liability may be enforced either by an action on the case for deceit, or by electing to treat him as principal. While the liability of agents, in cases belonging to the third class, has sometimes been doubted, the weight of authority appears to be that they are also liable. In *Story on Agency*, the learned

author, recognizing the undoubted liability of those belonging to the first two classes, says, "Another case may be put which may seem to admit of some doubt, and that is where the party undertakes to act as an agent for the principal, *bona fide* believing he has due authority, and therefore acts under an innocent mistake. In this last case, however, the agent is held by law to be equally as responsible as he is in the two former cases, although he is guilty of no intentional fraud or moral turpitude. This whole doctrine proceeds upon a plain principle of justice; for every person, so acting for another, by a natural if not a necessary implication holds himself out as having competent authority to do the act; and he thereby draws the other party into a reciprocal engagement. If he has no such authority and acts *bona fide*, still he does a wrong to the other party; and if that wrong produces injury to the latter, owing to his confidence in the truth of an express or implied assertion of authority by the agent, it is perfectly just that he who makes such assertion should be personally responsible for the consequences, rather than that the injury should be borne by the other party who has been misled by it:" Story on Agency, 264. This principle is sustained by the authorities there cited, among which is *Smout v. Ilbery*, 10 Mees. & Wels. 1, 9.

Without pursuing the subject further, we are of opinion that, upon the facts established by the verdict, judgment should have been entered for the plaintiff, on the question of law reserved.

Judgment reversed and judgment is now entered in favor of the plaintiff for \$3,027.20, the amount found by the jury, with interest from January 20, 1882, the date of the verdict.

Sheffield v. Ladue, 16 Minn. 388; *Skaaraas v. Finnegan*, 32 Minn. 107; *Baltzen v. Nicolay*, 53 N. Y. 467; *Stevens v. Walker*, 55 Ill. 151; *Taylor v. Shelton*, 30 Conn. 122; *Ogden v. Raymond*, 22 Conn. 379.

Exception.—Where Third Party Has Notice.

All the facts being known to both parties, and no express warranty existing, the agent is under no liability.

MICHAEL v. JONES.

Supreme Court of Missouri, 1884.

84 Mo. 578.

MARTIN, C. The plaintiff alleges in his petition that he sold and delivered to Robert L. Jones in his lifetime large quantities of wood of the price and value of \$6,525.35, and that after deducting all credits and payments on account thereof, there remains a balance still due him in the sum of \$2,932.25, for which he asks judgment. The answer in the case was filed before the death of Mr. Jones. In it he denies the allegations of the petition, except as thereafter stated by him. He pleads as a defense that the wood, for the price of which plaintiff sues, was sold and delivered to him as guardian of Joseph H. Locke, an insane person, whose estate and body he had charge of as guardian, by virtue of appointment of the Probate Court; that at the time of the sale thereof plaintiff knew that defendant was acting only in the capacity of guardian, and not otherwise; that at the time of such sale the agreement and understanding between plaintiff and defendant was that defendant was in no wise to be personally bound to pay for said wood, and that the plaintiff relied wholly upon the estate of said Locke for his pay, and never intended to hold defendant individually liable therefor. He also alleges that none of said wood was received to his use or benefit, but that it was all received to the use and benefit of the estate he had in charge.

The issues thus raised were tried by the Court without the intervention of a jury, and judgment was rendered in favor of defendant, who is the widow and administratrix of said Robert L. Jones. The plaintiff appealed from this judgment, accepting an affirmance *pro forma* in the St. Louis Court of Appeals. It is proper for me to mention in this connection that the plaintiff instituted an action in equity against the assets of the estate of said Locke in the hands of Mr. Lancas-

ter, who had succeeded Mr. Jones as guardian, for the same wood mentioned in this case, alleging in his petition substantially the material facts pleaded specially in the defendant's answer. In his petition he averred that the wood was sold and delivered for the use and benefit of the estate of said Locke, in the business of manufacturing lime and cement, which the guardian of said estate undertook to carry on, and did carry on after the death of said Locke, for the benefit of his wife and children, the beneficiaries of his estate. On appeal to this Court it was held that the guardian had no authority as such, to subject the assets of the estate under his charge to the risks and hazards of the manufacturing business undertaken by him, and that the plaintiff, furnishing his wood with full knowledge of the guardian's want of power to incur new obligations, acquired no lien upon the assets of the estate: *Michael v. Locke et al.*, 80 Mo. 548. The facts under which the wood was alleged, in the previous case, to have been sold and delivered to the estate, are ignored in the petition in this case, and the guardian is called upon to pay for the wood as if sold to him in his individual capacity and devoted to his private use.

In support of his case, the plaintiff urges that where a person assumes to act for or in behalf of another, without authority, an action can be maintained on the contract against the person improperly acting as agent. From this he concludes that Jones must have been liable to plaintiff for the value of the property delivered to him, if he had no power to bind the estate in his charge. If the bare want of authority in the agent or trustee to bind the person or estate for which he assumes to be acting, renders him individually liable, irrespective of facts and circumstances indicating that no such liability was contemplated by either party, then the plaintiff is entitled to judgment upon the facts admitted in the answer. But I am satisfied that under the best considered modern decisions the principle invoked by the plaintiff cannot be carried to such an extent. The true rule, I think, is stated in *Western Cement Co. v. Jones*, 8 Mo. App. 373, to this effect "that where

all the facts are known to both parties, and the mistake is one of law as to the liability of the principal, the fact that the principal cannot be held is no ground for charging the agent with liability." To the same effect is *Humphrey v. Jones*, 71 Mo. 62. In the present case there is no pretense that the guardian made any misrepresentation of fact, or was guilty of any concealment relating to his authority to contract with plaintiff. The evidence indicates clearly that both parties believed in good faith that the estate of Joseph H. Locke was responsible for the wood purchased by defendant in his capacity of guardian. Acting upon that faith, the guardian paid the plaintiff the greater portion of his debt from the assets of the estate. The simple fact that both parties were mistaken in the law about the authority of the guardian, ought not to render the guardian liable individually, in the absence of any promise to that effect by him, and when it is apparent that no benefit has been received by him.

The plaintiff undoubtedly could recover by establishing a lawful promise on the part of the guardian to be responsible individually, or by developing such facts and circumstances surrounding the sale and delivery of the wood as might prove that the credit according to the understanding of the parties, was really given to the guardian and not to the estate in his charge. This view of the law was conceded by the Court in an apt declaration applicable to the evidence before him: "The Court declares the law to be that if the plaintiff sold the wood to Robert L. Jones in his capacity as guardian of Joseph H. Locke, and did not intend to hold Robert L. Jones personally bound for the price of the wood, at the time of the sale, then plaintiff cannot recover." In rendering judgment for defendant the Court must have been satisfied that the plaintiff did not, as a matter of fact, intend to hold Robert L. Jones personally bound for the price of the wood at the time of selling the same. There is ample evidence in the record to sustain this finding; accordingly the judgment is affirmed.

Western Cement Co. v. Jones, 8 Mo. App. 373; *Humphrey v. Jones*, 71 Mo. 62.

2

AGENT ACTING AS PRINCIPAL PERSONALLY BOUND.

An agent who represents himself to be principal is personally bound, unless the person with whom he thus deals has notice of the agency.

BUTTON *v.* WINSLOW.

Supreme Court of Vermont, 1881.

53 Vt. 430.

REDFIELD, J. The people of Brandon celebrated the Fourth of July. They appointed an "executive committee" to make the necessary preparations. The defendant, as one of such committee, purchased of the plaintiff twenty-one kegs of powder, at the agreed price of \$4 per keg. At the time of the purchase, the plaintiff asked the defendant "his authority," and the defendant replied, "Mr. Pitts, chairman of the executive committee, is my authority;" and the referee reports that from this conversation the "plaintiff understood that the defendant himself was the committee to buy powder, or one of the committee, and the responsible man." The report is meagre, but the fact is stated that in selling the powder, the plaintiff understood the defendant was one of the committee to buy powder and the *responsible man*, and there is intimation, in the report, that defendant gave the plaintiff no reason to understand otherwise; on the contrary, it is apparent that the plaintiff might properly so understand the defendant. He agreed upon the price and ordered the powder, and his liability therefore followed as a matter of course, unless he represented himself the agent of a principal whom he would bind. The fact that he stated that Pitts was chairman of the executive committee and his authority for buying the powder is not a statement that he bought the powder for and as agent of Pitts. It is proper to "make a great noise" on such an anniversary, but it is also most proper that the man who buys the powder should pay for it, unless he avows an agency that fixes the liability on another. And this, we think, is strictly legal.

Judgment affirmed.

Sturdivant *v.* Hull, 59 Me. 172; Youghiogheny *v.* Smith, 66 Pa. St. 340; Sayre *v.* Nichols, 7 Cal. 535; Pratt *v.* Beaupre, 13 Minn. 187.

3

OTHERWISE NOT.

But one who contracts simply as agent, giving notice of the agency, incurs no personal liability.

BOYNGE *v.* FIELD.

New York Court of Appeals, 1880.

81 N. Y. 159.

MILLER, J. The rule is well established that when a person contracts as the agent of another, and the fact of his agency is known to the person with whom he contracts, the principal alone, and not the agent, is responsible. This rule applies to the relationship of attorney and client, and except to a certain class of officers who are not within the general rule, attorneys cannot be held personally responsible for services of this kind rendered in a suit, unless there is a special obligation to that effect: *Judson v. Gray*, 11 N. Y. 408; *Covell v. Hart*, 14 Hun, 252; *Boynge v. Waterbury*, 12 Ib. 534; *Sheridan v. Genet*, Ib. 660. The charges of stenographers are within the principle laid down, and unless the evidence establishes that the services, for which a recovery is claimed in this case, were rendered upon the responsibility of the defendants, the complaint was properly dismissed upon the trial.

The testimony does not establish any positive agreement to pay the stenographers for their services, or any distinct employment by the defendants personally. No such demand was made by the stenographers, nor any such promise given by the defendants; and it was expressly stated by one of the defendants that they would have to be careful in making any engagements, for their client was a very particular man. They were, therefore, cautious in assuming any responsibility whatever, and if any such was incurred, it can only be inferred from the construction to be placed upon the acts and conduct of the parties, which are particularly urged as establishing an employment by the defendants, and to these we will briefly refer.

It is claimed that the evidence shows a delivery of the bill rendered to the defendants at the time of its date, and that no objection was made until a long time afterward. One of the assignors of the plaintiff testified that he went to Mr. Field, senior, having rendered a bill to the firm, in response to a message that he had received to know how much it amounted to at that time, and asked him if he could not let him have the amount of the bill, and he said he had not received anything from his client, and that the stenographers must wait. He also testified that at the close of the case a bill was rendered for the *amount* of services performed, without stating the items, to whom or at what particular time. It does not appear what any of these bills contained, in whose name they were made out, or to whom, if any one, the services were charged. A single bill was afterward read in evidence by the plaintiff, which purports to have been made, or which bears date, March 11, 1876, and the following testimony was given by one of plaintiff's witnesses: Q. "This is dated March 11, 1876; was that after the performance of all the work you did in the Tweed case?" (Bill shown witness.) A. "I presume it to be; I don't know; I have no recollection of the exact figures; the books will show; after the rendition of this bill, another one was sent; I do not know whether we received any communication from Field & Deyo in reference to that bill." No books are produced, and no proof given that it was taken from the books, or that it was a copy of any bill which had been rendered to the defendants. A letter from the defendants had previously been introduced by the plaintiffs, bearing date November 28, 1876, acknowledging the receipt of a bill the day previous, and stating that it was made out in their name as debtors, and should be made out against Mr. Tweed, and that they would do their best to procure payment of it and had little doubt that it would be paid. The plaintiff could have shown precisely how the matter stood; when the bills, if any, were sent, and what they contained; and, failing to do this, it is a fair presumption that the letter, which repudiated any personal liability, referred to the first and only bill re-

ceived, and as the defendants denied their liability, it was not established by the bill rendered, nor was it necessary to repeat the denial of liability which had been previously made. As to the date of the bill introduced, it most probably related to the time when the charge was made, which, as the bill itself shows, was a few days after the last item of service was performed. But whether it was so or otherwise is not material, as the proof does not show that the bill introduced was the same as the one sent. It cannot be said, then, that the proof given does establish that the bill was retained without making any objection within a reasonable time, or that the defendants acquiesced in its correctness. Nor is any inference to be derived from the date of the charge that it was delivered at that time. The rule that a document or instrument is presumed to be delivered at the time it bears date rests upon a different principle and has no application to the facts presented.

No claim is made in the printed points that one of the defendants conceded their liability, by not responding when it was stated that the stenographers held them responsible for the bill. It appears that the defendants had stated previously that one of Tweed's counsel had said that the money was coming at a certain time, and in the different conversations also stated that they expected money from Tweed with which the bill should be paid. Under the circumstances, as the defendants' denial of their liability must have been understood, I do not think that a failure to respond to the remark referred to furnished sufficient evidence to make them responsible.

The defendants never admitted any liability, and there is no direct proof showing that they intended or expected to be responsible personally; and as the account is not of such a character as attorneys are primarily bound to pay, and there is no proof that the defendants actually employed the plaintiffs, or assented to their claim, a recovery would be based upon the merest conjecture, and upon loose inferences not fairly to be derived from the testimony, and could not be upheld. It follows that the Judge at the trial committed no error in directing that the complaint be dismissed.

There was no error in excluding the testimony offered to show that at the time of the interview between one of the defendants and Mr. Underhill, Tweed had escaped from prison, was on his way to parts unknown, and that the newspapers contained the announcement of his escape. It was immaterial, took place some time after the services were performed, was only a statement in a newspaper report, and could have no bearing upon the case.

The evidence offered of previous dealings of the plaintiff's assignors with the defendants, when said assignors performed work on like retainers, furnished bills to the defendants, and received from them payment for said bills, was properly excluded. What had been done on other occasions would not show what the contract was in reference to this transaction, and render the defendants liable for the plaintiff's claim in this case. The authorities cited do not sustain the competency of the evidence, and it was properly excluded.

Judgment affirmed.

Covell v. Hart, 14 Hun, 252; *Worthington v. Cowles*, 112 Mass. 30.

4

FRAUDS.

An agent is personally liable for his frauds, whether committed in his own or his principal's behalf.

HECKER v. DE GROOT.

Supreme Court of New York, 1857.

15 How. Pr. 314.

CLARKE, J. The defendants are sued for damages occasioned by a fraud committed by them. It matters not in what capacity they acted, or with whom they co-operated. They were instrumental in perpetrating the acts constituting the fraud. This is admitted by the demurrer. If indeed a person is the unconscious instrument of others in committing an injury, he is not personally liable for the consequences;

but where he knowingly engages in an unlawful course, whether for his own immediate benefit or not, he cannot escape liability by showing that he acted as an agent.

The amount of damages is never the subject of demurrer. This is to be determined at the trial.

Demurrer overruled, with liberty to answer in twenty days, on payment of costs of term.

Weber v. Weber, 47 Mich. 569 ; *Lee v. Mathews*, 10 Ala. 682 ; *Baker v. Wasson*, 53 Tex. 150 ; *Johnson v. Barber*, 5 Gill. (Ill.) 425.

C

DUTIES OF PRINCIPAL TO AGENT.

1

COMPENSATION.

The agent is entitled to compensation for his services.

SUSSDORF v. SCHMIDT.

New York Court of Appeals, 1873.

55 N. Y. 319.

CHURCH, C. J. This action is for brokerage upon the sale of valuable real estate situated on Long Island.

The plaintiff claimed \$50,000 as agreed compensation, and the principal points litigated were whether such agreement had been made or whether the plaintiff was in fact the efficient cause of the sale. The jury found against the special agreement, but found for the plaintiff a verdict which allowed him a commission, probably of two and a half per cent. upon the amount of the sale. Upon the close of the plaintiff's evidence, the defendants moved for a non-suit upon the ground that the plaintiff had not shown himself to be the efficient cause of the sale, which was denied, and this is now claimed to have been erroneous.

A person claiming a commission upon a sale of real estate must show an employment, and that the sale was made by means of his efforts or agency. An owner may employ several brokers for the sale of the same property, and is of course only liable for commissions to the one who effects the sale. And although he employs one or more brokers he may negotiate and sell the property himself without liability to any one for commissions: 49 N. Y. 563. The undertaking of the broker is to make efforts to procure a purchaser, but if he fails he is entitled to no pay unless there is a special contract. But if the purchaser is found by his efforts and through his instrumentality, he is entitled to compensation, although the owner negotiates the sale himself: 51 N. Y. 124. Nor is it indispensable that the purchaser should be introduced to the owner by the broker nor that the broker should be personally acquainted with the purchaser; but in such case it must affirmatively appear that the purchaser was induced to apply to the owner through the means employed by the broker.

The evidence on the part of the plaintiff tended to prove that the plaintiff acted as a broker for the seller of the property to the defendants, and from motives of personal friendship to them was anxious that they should purchase, as he believed it was a good speculation; that he claimed from them a part of the commission upon that sale, which they declined to pay, but told him to get what he could from the seller and he should have a part of the profits when they sold; that he also suggested to the defendants the mode of disposing of the property to realize the most money; that he procured some maps from the seller which he put up in different places, and also procured signs to be painted and put up near the premises, and inserted an advertisement of the property in the *Long Island Star*, which referred to the plaintiff as a broker, and which was recognized and paid for by the defendants; that sometime afterward a sale of the property was negotiated by the defendants with one Marwig, acting in behalf of an association of bricklayers, at \$420,000. Marwig was introduced to

the defendants by one Eckersdoff, a real estate broker, and the evidence of the plaintiff tended to show that both he and Marwig were attracted to this property by the maps and signs and advertisements which the plaintiff put up and caused to be made. It is shown that they frequently spent their evenings in a saloon where the plaintiff had put up a map, and talked about the property; that Marwig and another person went to look at the property, and was told by a hotel keeper where he called, and at whose house a map had also been put up by the plaintiff, where to find the property and where to inquire for the plaintiff. The plaintiff had no personal communication with Marwig or Eckersdoff before the negotiation for the purchase of the property; but during the negotiation he inserted an advertisement in the *Staats Zeitung*, when the defendants sent for him and told him not to advertise the property any more or make any further efforts to effect a sale, as they were in negotiation with other parties, and that he should have his commission if the sale was effected. From this evidence the jury might fairly infer that the purchaser was secured by the efforts of the plaintiff, and that the claim of the plaintiff to brokerage was recognized by the defendants by their promise to pay it. It did not appear that the defendants knew that Eckersdoff and Marwig came to purchase in consequence of information obtained through the plaintiff, and it may be that this fact, if it existed, was designedly withheld from them so as to secure commissions for Eckersdoff. However that may be, it is not conclusive against the plaintiff. If he was the producing cause of this sale, his right to compensation would not be affected by the circumstance that the defendants were ignorant of it at the time, nor should he be prejudiced by the acts of others. It was not error to refuse the non-suit and submit the facts to the jury. Some of those facts were controverted by the defendants, and considerable evidence was produced to prove that the plaintiff had no agency in procuring the purchaser, and that the sale was effected entirely independent of him. It is not our province to pass upon the facts. The Court fairly submitted the ques-

tion, whether the plaintiff was the procuring cause of the sale, to the jury, and their decision is conclusive upon us.

The point is made, that there was no evidence of the rate of commissions nor of the value of the plaintiff's services. The plaintiff claimed a specific sum agreed upon, and the evidence was mainly directed to the question whether such sum had been fixed by the parties, but there was some evidence which might legitimately guide the jury upon that question. The plaintiff testified, upon cross-examination, that he received one per cent., which was \$700, from the seller upon the sale to the defendants, and that his whole commission would have been \$1,750, which would be two and a half per cent., and that when the defendants requested him not to make any further efforts to sell the property for them, one of them said, "you shall have your commission or your pay any how." From these facts, if true, it might be inferred that the usual rate was two and a half per cent., and that defendants referred to that rate in their promise. It is true that the plaintiff stated that he received from the first sellers one-half of the brokerage, and that was one per cent., or \$700, but when asked the distinct question how much his whole commission would be, he answered \$1,750, which was two and a half per cent. It is unnecessary to consider whether the evidence given of the alleged sum agreed to be paid would be any criterion for the jury in awarding damages. The other evidence, although rather slight, was sufficient to uphold the verdict.

The learned counsel for the defendants also insists that, inasmuch as the complaint is upon a contract for a specific sum, the plaintiff could not recover as upon a *quantum meruit*. This point is not tenable for several reasons.

1. The complaint contains sufficient averments to enable the plaintiff to recover the value of the services rendered, without reference to the allegation of an agreed compensation. 2. At most it was only a variance between pleading and proof, which might be disregarded unless it misled the defendants, which was not pretended: Code, § 169. 3. This objection was not taken at the trial. The exception to that part of the charge

authorizing the jury, if they found that no specific sum was agreed upon, to find the value of the services, was too general to raise this question. The attention of the Court should have been called to the point, as, if valid, it might then have been obviated by an amendment.

The offer to prove what share of the recovery the plaintiff had agreed to give his attorney was properly rejected. It was immaterial; as such arrangements are now lawful, a party is not discredited as a witness by making them. Nor does an agreement to give an attorney a share of a recovery, for his services, give him such an interest in the cause of action as would make his admissions proper or make him liable for costs.

So, whether the defendants had realized profits from the sale was immaterial. When the defendants made the contract of sale the duties of the plaintiff ceased, and his right to compensation was then fixed, whether the defendants ever realized profits or not. The offer only contemplated profits then realized, without taking into account the unpaid purchase-money. Besides, the question of profits could only be material under the special contract, which was not found to exist.

We do not find that any substantial error of law was committed on the trial, and the judgment must be affirmed.

Judgment affirmed.

Turnbull v. Northwestern Co., 46 Minn. 513; *Walton v. Clark*, 54 Minn. 341.

The agent is entitled to reimbursement for all proper outlays in connection with the agency: *Searing v. Butler*, 69 Ill. 575.

Indemnity: *Guirney v. Railway Co.*, 43 Minn. 496.

D

LIABILITY OF PRINCIPAL TO THIRD PARTIES.

1

DISCLOSED PRINCIPALS.

The principal is liable to third parties for every act of the agent done within the apparent scope of the authority.

JOHNSON *v.* HURLEY.

Supreme Court of Missouri, 1893.

115 Mo. 513.

MACFARLANE, J. The suit is ejectment to recover possession of the northwest quarter, section 5, township 53, range 7, in Ralls County. The answer set up an equitable defense to the effect that defendant had purchased the land from the duly authorized agent of the plaintiffs, had received from said agent deeds purporting to be duly executed and acknowledged by plaintiffs and purporting to convey to him said lands; that he had paid to said agent the entire purchase price for the land, to wit, \$1,650, its fair value, and had been put in possession under his said purchase; that he had in good faith fenced said land and erected thereon a dwelling-house and other valuable and permanent buildings and improvements, and prayed specific performance. The reply denied the new matter of the answer.

The cause was tried as a suit in equity for specific performance of a contract for the conveyance of land, and a decree entered for defendant according to the prayer of the answer, and plaintiffs appealed.

The evidence showed that about the year 1836 one Peter Johnson, a resident of Morristown, N. J., entered about twenty-five hundred acres of land situate in Ralls County, Mo.; that said Peter Johnson died in the year 1854, leaving plaintiffs John M. and Martha J. Johnson, and one Phœbe Johnson, since deceased, without issue, his only heirs-at-law. About

the year 1868 plaintiffs appointed one Joseph R. Winchell, of Hannibal, Mo., as their agent. Soon after this, plaintiff John M. moved to the State of Illinois, the two sisters remaining in New Jersey.

Winchell not proving a satisfactory agent, about the year 1878, plaintiffs sent out to Missouri Finley A. Johnson, a son of plaintiff, John M. Johnson, then a lawyer and judge of Newark, N. J., to settle with Winchell. A settlement was made, Winchell discharged, and the said Finley A. appointed in his stead without, as plaintiffs claim, authority to make sales of the land.

On the 16th of April, 1881, the said Finley A. Johnson, assuming to act as the agent of plaintiffs and their sister Phoebe, sold to defendant the east half of said northwest quarter for the sum of \$800, and afterward on January 10, 1882, he sold him the west half of said quarter for the sum of \$850; that defendant paid the purchase-money to the said Finley A. Johnson at the respective dates of sale and received from him deeds purporting to be signed and acknowledged by plaintiffs and said Phoebe. Under these purchases defendant went into possession of the land which was then unimproved, fenced it, built a dwelling-house and other buildings thereon, and reduced it to cultivation.

The evidence further showed that the deeds and the acknowledgments were forged by the said Finley A., and that plaintiffs never knew that contracts or deeds had been made or that money had been paid their agent until 1884, after he had absconded.

The question is whether these sales made by their agent were binding on plaintiffs.

1. The evidence leaves no doubt that plaintiffs' agent made the contracts with defendant for the sale of the land, assuming to act for them, that he received the purchase-money, delivered a deed to which their names were signed and to which an acknowledgment, certified in due form by the said agent as notary public, was attached, and that under said transaction, and relying on it, defendant in good faith went into the pos-

session and made valuable and lasting improvements. Under these circumstances, if said agent was authorized to make the sale, it would be the grossest injustice and fraud on defendant to deny him the benefit of the contract for the reason that it was not in writing as required by the statute of frauds. To prevent such injustice Courts of Equity have uniformly held that such part performance relieves the contract of the infirmity created by the statute, and specific performance will not be denied: *Emmel v. Hayes*, 102 Mo. 193; *Bowles v. Wathan*, 54 Mo. 264.

2. The question then is, whether Finley A. Johnson had authority from plaintiffs to make a sale of these lands.

It may be stated, in the first place, as a general rule, that an agent can only act within the circumscribed authority given him by his principal, and one who deals with him is put upon his guard by the very fact that he is dealing with an agent and he must ascertain for himself the nature and extent of his authority. The burden is, therefore, always cast upon one claiming the benefit of a contract made with another who assumes to act as the agent of a third person to establish by satisfactory evidence that the contract relied upon was within the scope of the agent's authority: *Mechem on Agency*, §§ 276-289, and cases cited.

3. The evidence we think fails to establish an express authority from the plaintiffs to the said Finley A. Johnson to conclude contracts for the sale of these Missouri lands, or to make the particular contract in question. Both of them in testifying in the case very emphatically deny such authority, and no evidence was introduced by defendant showing directly that any was given. The authority then, if any existed, must be implied or presumed from the conduct of the parties.

The general rule, which accords with the decisions in this State, is given by *Mechem* in his work on *Agency*, as follows: "It may therefore be stated as a general rule that, whenever a person has held out another as his agent authorized to act for him in a given capacity, or has knowingly and without dissent permitted such other to act as his agent in such capacity; or

where his habits and course of dealing have been such as to reasonably warrant the presumption that such other was his agent authorized to act in that capacity, whether it be in a single transaction or in a series of transactions, his authority to such other to act for him in that capacity will be conclusively presumed, so far as it may be necessary to protect the rights of third persons who have relied thereon in good faith and in the exercise of reasonable prudence, and he will not be permitted to deny that such other was his agent, authorized to do the act that he assumed to do, provided that such act is within the real or apparent scope of the presumed authority." *Rice v. Groffmann*, 56 Mo. 434; *Summerville v. Railroad*, 62 Mo. 391.

We are of the opinion that authority to make these sales is clearly implied from the conduct of the parties. One of the owners of the land, a preacher, lived in the State of Illinois, the other two, unmarried ladies, lived in the State of New Jersey. So far as appears no one of them ever visited the land or gave any personal attention to it. From 1868 to 1883 it was in the hands of agents for sale. For most of this time the said Finley A. Johnson, a son of one of the owners and a nephew of the other two, a lawyer, a notary public and judge of a court, who lived in the State of New Jersey, was one of the agents. The acknowledgment of deeds was made before him; he paid taxes; he delivered deeds to purchasers; he collected purchase-money; took notes and deeds of trust in his own name for deferred payments; he removed other local agents and made settlements with them; he was in fact for years the medium through whom all the business was transacted.

Plaintiff John M. Johnson testified on direct examination: "The authority of Finley A. Johnson as given him by us in reference to our Missouri lands was to look after the payment of taxes, receive applications and offers for the land and the terms, and to transmit the same to us, and when these applications, offers, and terms were considered by us they were referred back to him with instructions. He had no authority whatever to sell the lands or to close the sales for lands. That

was done by us. He only received proposals to purchase. We never gave him any written authority or power of attorney. I never heard of the sales to defendant Hurley or the Hurley deeds until long after the purported deeds had passed."

The other plaintiff gave substantially the same testimony.

On cross-examination, the said John M. Johnson testified: "We sent the deeds on to him (referring to a former agent) and he collected and kept the money. My son, F. A. Johnson, discharged him, and he became our agent in 1873. I do not know definitely who paid the taxes from then until 1883, but suppose that he did; he was to pay them. From 1873 to 1880 there were a few sales of the Missouri lands made. These sales were made through the agency of F. A. Johnson in some form. Made virtually by me, he collected the purchase-money. I authorized him to do that. The deed to W. L. Schultz made August 31, 1873, is a genuine deed signed by us, and the acknowledgment was made before Finley A. Johnson, who was then a notary public and judge of a court in New Jersey. That sale was made as usual by being submitted to and ratified by myself and sisters; it could not be a complete sale otherwise. I don't know who the consideration was paid to. In 1878 James F. Hedrick purchased some land of us; our signatures to his deed are genuine. I do not know who made the sale, but know under the general conditions of sale F. A. Johnson made the sale and it was ratified by us. I presume F. A. Johnson delivered the deed and collected the purchase-money. We also sold some land to Thomas J. Richards and Jehu Underwood in 1880. Our signatures to the deed are genuine and the acknowledgments of my sisters were made before F. A. Johnson. I never delivered any of the deeds myself; the money for the purchase of the lands was paid to Finley A. Johnson, and he delivered the deeds. I presume this was usually the case. The leases to such lands as were leased, I think, were made by F. A. Johnson, and he collected the lease money. Finley A. Johnson was my son, and a rising man; of course I was proud of him. I trusted him, and yet not so implicitly as to permit him to transact my

business without first referring it to me. In fixing the prices of the land we were generally governed by the offers made by the purchasers and referred to us. I presume his judgment was taken after he had made a personal inspection of the land. The land was all for sale. He paid money to me on these sales without telling me where it came from, and of course I cannot remember the particular transactions."

The manner in which this business was transacted through this agent for ten or more years was known in the community and to defendant. All inquiries in regard to the land were made of this agent; prices were given by him; purchase-money paid to and deeds received from him; lands leased and rents collected by him, and all under express authority. There was also evidence that a former agent, the one removed by Finley A., made sales and executed contracts upon which plaintiffs afterward made deeds. That agent was removed for withholding money and Finley A. was appointed with express authority to collect purchase-money. Why this agent with all these express powers should have been restricted only in the matter of making sales is not explained by the evidence.

We think the conduct of plaintiffs in the transaction of this business such as would reasonably have induced defendant to believe that the agent with whom he dealt had authority to make the sales, and after having acted upon that belief, paid the purchase price and expended large sums in improvements, plaintiffs will not now be heard to dispute the authority.

We are well satisfied with the conclusions reached by the Circuit Judge, and affirm the judgment.

U. S. v. Voss, 1 Cranch C. C. 101; Moir v. Hopkins, 16 Ill. 313; Innerarity v. Merchants' Bank, 139 Mass. 332; Constant v. University, 111 N. Y. 604.

2

UNDISCLOSED PRINCIPALS.

Simple Contracts.

An undisclosed principal is liable upon all simple contracts made by his authorized agent in his behalf.

LOVELL v. WILLIAMS.

Supreme Judicial Court of Massachusetts, 1878.

125 Mass. 439.

MORTON, J. This is an action of contract to recover for merchandise, such as seeds, fertilizers, and farming tools, sold and delivered to the husband of the defendant, and used on the farm owned by the defendant, and on which she and her husband resided. The ground upon which the plaintiff bases his claim is that the husband was carrying on the farm as the agent of the defendant, and that he has the right to resort to her as an undisclosed principal.

1. The defendant testified "that her husband had always carried on the farm by her leave, and was not her agent, and that she had nothing to do with the carrying on of the farm." The plaintiff was permitted, in rebuttal, against the objection of the defendant, to introduce testimony tending to show "that, in settlement of a bill for similar merchandise used on said farm, and sold, delivered, and charged by another merchant in Worcester to the defendant's husband, in like manner that the plaintiff's merchandise was, and during the period of time covered by the plaintiff's account, this defendant gave her note, and, after one renewal, paid it."

We are of opinion that this evidence was competent. It proved an act of the defendant which had some tendency to contradict her testimony, and to show that she recognized her husband as her agent in carrying on the farm.

2. The defendant asked the Court to rule that "when a married woman is living with her husband, whether on her real estate or not, in the absence of controlling evidence to the

contrary, the presumption is that the expenses of the family and the ordinary expenditures for carrying on the place, are the husband's, and not the wife's." This ruling was properly refused. The case did not call for any ruling as to what would be the presumption if the husband and wife were living on real estate not her own property, or as to what would be the presumption in regard to "the expenses of the family."

The instructions given in response to the request were such as were required by the evidence in the case, and were sufficiently favorable to the defendant. If a married woman lives with her husband upon real estate which is her sole and separate property, there is no presumption of law that she is not liable, and that he is liable, for "the ordinary expenditures for carrying on the place." Her liability in the case at bar depends upon the question of fact whether she has, personally or through an agent, entered into any contracts in reference to her separate property; and this question was properly submitted to the jury.

3. The defendant requested the Court to rule that "the plaintiff cannot recover under the third count of his declaration, on the pleadings and the evidence." In regard to this count, it appears from the bill of exceptions that the goods embraced therein were sold prior to January 1, 1870; that on that day the note of the husband of the defendant "was given for the account declared on in the third count," and that the plaintiff did not discover until 1872 that the defendant owned the farm, and was liable to him as the undisclosed principal of her husband. At the trial, the defendant contended that this evidence proved conclusively that the account had been paid. The third request was refused, and the presiding Judge, "after stating to the jury that the law in Massachusetts made a negotiable promissory note, given for an account, *prima facie* payment of the account, added that, when the note given is not the obligation of all the parties who are liable for the account, the presumption, if it exists at all, is of much less weight; and that, in dealing with the question whether the note given in this case was received in payment, they were to consider this

principle, if they should find upon the evidence that the husband was in fact the agent of the wife in making the purchase of the plaintiff, and that she was her husband's undisclosed principal in the transaction." To this instruction the defendant excepted, as not applicable to the facts in the case.

The rule in Massachusetts is, that if a negotiable promissory note is given for a pre-existing debt, the presumption is that the creditor intended to receive it in payment of such debt. But this presumption may be rebutted and controlled; and the fact that such presumption would deprive the creditor taking the note of the substantial benefit of some security, such as a mortgage, guaranty, or the like, has been held to be sufficient evidence to meet and repel the presumption: *Butts v. Dean*, 2 Met. 76; *Curtis v. Hubbard*, 9 Met. 322; *Appleton v. Parker*, 15 Gray, 173; *Tucker v. Drake*, 11 Allen, 145.

The case of *French v. Price*, 24 Pick. 13, more nearly resembles the case at bar. In that case, the plaintiff sold goods to an agent acting for undisclosed principals. He afterward took the notes of the agent for the account, and the principal question of fact in the case was whether, at the time he took the notes, he knew that the agent was acting for undisclosed principals. The Court, in the opinion, say: "If there was any deception or fraud in the giving of the notes, or if they were accepted under an ignorance of the facts, or a misapprehension of the rights of the parties, the vendors ought not to be bound by the acceptance. They may repudiate the notes, and rely upon the original contract of sale. If, when the notes were taken, the vendors supposed that the promisors only were holden for the goods, and that they were not changing the parties, but only taking new security from the same parties, then it is very clear that the original contract was not so far extinguished as to prevent a resort to it when new parties were discovered."

In the case at bar, the plaintiff, when he took the note in question, was ignorant of the fact that the husband of the defendant was her agent, and that she was liable for the goods sold. He supposed that the promisor on the note was alone

liable for them. It would work a fraud on him to hold that the original contract was extinguished so as to prevent a resort to the defendant, when he discovered her liability under it.

It is clear, therefore, that the instructions given were sufficiently favorable to the defendant.

Exceptions overruled.

Byington v. Simpson, 134 Mass. 169; *Hyde v. Wolf*, 4 La. 234; *Church v. Wiley*, 2 Hill Ch. (S. C.) 584; *Henderson v. Mayhew*, 2 Gill. (Md.) 393.

Specialties.

In case of specialties only those are bound who appear on the face of the instrument to be parties to it.

BRIGGS v. PARTRIDGE.

New York Court of Appeals, 1876.

64 N. Y. 357.

APPEAL from judgment of the General Term of the Superior Court of the city of New York affirming a judgment in favor of defendants, entered upon an order dismissing plaintiffs' complaint on trial. (Reported below, 7 J. & S. 339.)

This action was brought to recover the purchase-money unpaid under a contract for the purchase and sale of land.

The complaint alleged that the plaintiffs entered into an agreement in writing with one L. P. Hurlburt, who was acting for and under the authority of the defendants, "whereby these plaintiffs sold and the defendants through said Hurlburt bought" a certain described piece of land, "for the sum of \$7,200, which said sum the defendants, through their agent, the said Hurlburt, agreed to pay," as specified. That it was further agreed that the plaintiffs should deliver the deed, and that the defendants should accept the same and pay the balance of the purchase-money unpaid on the 1st day of February, 1874; that the defendants, through said Hurlburt, paid on the delivery of the agreement \$100; that on the said 1st day of

February, 1874, the plaintiffs were "ready to carry out on their part the agreement aforesaid by executing and delivering to said Hurlburt, for and on account of said defendants, a good and sufficient deed of the premises hereinbefore described." Whereas the defendants wholly failed on their part to fulfill said agreement or to take title to said property, but on the contrary refused, and they have ever since refused so to do, and the plaintiffs demanded judgment that the defendants perform said agreement and pay to plaintiffs the sum agreed. The answer was a general denial.

Plaintiffs' counsel, in opening the case on the trial, said that the agreement on which the plaintiffs relied was in writing; that it was made by the plaintiffs as vendors, and Llewellyn P. Hurlburt as vendee; that the written instrument did not show but that Hurlburt was a principal party; that it was signed and sealed by Hurlburt individually; that the name of defendant Partridge did not appear in the instrument, but that plaintiffs would prove that the said Hurlburt was acting solely for and under the direction of Thomas M. Partridge, who paid or caused to be paid the first payment under the contract; the said Hurlburt was the agent and trustee of said Partridge in the transaction, and the authority given by Partridge to Hurlburt was oral.

On this opening and on the complaint the defendants' counsel moved to dismiss the complaint on the grounds: 1. That the facts stated in the opening and by the complaint did not constitute a cause of action. 2. That it was not competent to vary the terms of the written contract by parol proof that the party who executed the same as principal was not a principal but an agent.

The plaintiffs' counsel further offered to prove that Hurlburt was constituted by parol agent to enter into and execute the contract in behalf of the defendant Partridge; that at the time the contract was made the plaintiffs did not know that Partridge was the real principal; that the plaintiffs tendered a deed to Hurlburt, and did not at that time know that Partridge was the real principal.

The motion was thereupon granted, and plaintiffs' counsel duly excepted.

ANDREWS, J. The defendant was not a party to the agreement for the sale and purchase of the land. He did not sign it himself, nor did it purport to have been executed for him by Hurlburd. His name does not appear in it, and there is nothing upon the face of the agreement to indicate that he was in any way connected with or interested in the purchase. The covenants in the agreement are solely between the plaintiff and Hurlburd. The former covenants to sell and convey the land to Hurlburd, and Hurlburd covenants to purchase and to pay the purchase-money as stipulated. The defendant took no part in the negotiation of the agreement, and the plaintiff, when he made and executed it, had no knowledge that Hurlburd was acting as the agent of the defendant. The agreement was under seal, each party affixing his own seal to the instrument. Hurlburd, the apparent purchaser, was in fact acting in the transaction as the agent of the defendant, his undisclosed principal, under an oral authority to enter into the contract in his behalf, and the defendant furnished the money to make the down payment to the broker who negotiated the sale. This action is brought by plaintiff upon the agreement to recover the unpaid purchase-money, and it is sought to enforce it against the defendant as the real purchaser and party, upon the ground that Hurlburd, the nominal purchaser, was acting for him and by his authority in the transaction. The real question is can the vendor, in a sealed executory agreement, *inter partes*, for the sale of land, enforce it as the simple contract of a person not mentioned in or a party to the instrument, on proof that the vendee named therein, and who signed and sealed it as his contract, had oral authority from such third person to enter into the contract of purchase, and acted as his agent in the transaction, and can the vendor on this proof, there having been no default on his part, and he being ready and willing to convey, recover of such third person the unpaid purchase-money? This question

here arises in a case where the vendor, so far as it appears, has remained in possession of the land, and where no act of ratification of the contract by the undisclosed principal has been shown. It is not disputed, and, indeed, it cannot be, that Hurlburd is bound to the plaintiff as covenantor upon the covenants in the agreement. He covenants for himself and not for another, to pay the purchase-money, and by his own seal fixes the character of the obligation as a specialty. He is liable to perform the contract irrespective of the fact whether it can be enforced against his nominal principal. On the other hand it is equally clear that Hurlburd's covenant cannot be treated as or made the covenant of the defendant. Those persons only can be sued on an indenture who are named as parties to it, and an action will not lie against one person on a covenant which purports to have been made by another: *Beckham v. Drake*, 9 M. & W. 79; *Spencer v. Field*, 10 Wend. 88; *Townsend v. Hubbard*, 4 Hill, 351.

In the case last cited it was held that where an agent duly authorized to enter into a sealed contract for the sale of the land of his principals, had entered into a contract under his own name and seal, intending to execute the authority conferred upon him, the principals could not treat the covenants made by the agent as theirs although it clearly appeared in the body of the contract that the stipulations were intended to be between the principals and purchasers, and not between the vendees and the agent. The plaintiffs in that case were the owners of the land embraced in the contract, and brought their action in covenant to enforce the covenant of the vendees to pay the purchase-money, and the Court decided that there was no reciprocal covenant on the part of the vendors to sell, and that for want of mutuality in the agreement the action could not be maintained. It is clear that unless the plaintiff can pass by the persons with whom he contracted and treat the contract as the simple contract of the defendant, for whom it now appears that Hurlburd was acting, this action must fail. The plaintiff invokes in his behalf the doctrine that must now be deemed to be the settled law of this Court, and which

is supported by high authority elsewhere, that a principal may be charged upon a written parol executory contract entered into by an agent in his own name, within his authority, although the name of the principal does not appear in the instrument, and was not disclosed, and the party dealing with the agent supposed that he was acting for himself, and this doctrine obtains as well in respect to contracts which are required to be in writing as to those where a writing is not essential to their validity: *Higgins v. Senior*, 8 M. & W. 834; *Trueman v. Loder*, 11 Ad. & Ellis, 594; *Dykers v. Townsend*, 24 N. Y. 61; *Coleman v. First Nat. Bk. of Elmira*, 53 N. Y. 393; *Ford v. Williams*, 21 How. 289; *Huntington v. Knox*, 7 Cush. 371; *The Eastern R. R. Co. v. Benedict*, 5 Gray, 566; *Hubbert v. Borden*, 6 Wharton, 91; *Browning v. Provincial Ins. Co.*, 5 L. R. [P. C.] 263; *Calder v. Dobell*, 6 L. R. [C. P.] 486; Story on Agency, §§ 148, 160.

It is, doubtless, somewhat difficult to reconcile the doctrine here stated with the rule that parol evidence is inadmissible to change, enlarge, or vary a written contract, and the argument upon which it is supported savors of subtlety and refinement. In some of the earlier cases the doctrine that a written contract of the agent could be enforced against the principal was stated with the qualification, that it applied when it could be collected from the whole instrument, that the intention was to bind the principal. But it will appear from an examination of the cases cited, that this qualification is no longer regarded as an essential part of the doctrine. Whatever ground there may have been originally to question the legal soundness of the doctrine referred to, it is now too firmly established to be overthrown, and I am of opinion that the practical effect of the rule as now declared is to promote justice and fair dealing. There is a well-recognized exception to the rule in the case of notes and bills of exchange resting upon the law merchant. Persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them; and a person not a party cannot be charged upon proof that the ostensible party signed or indorsed as his

agent: *Barker v. Mechanics' Ins. Co.*, 3 Wend. 94; *Pentz v. Stanton*, 10 Ib. 271; *De Witt v. Walton*, 9 N. Y. 571; *Stackpole v. Arnold*, 11 Mass. 27; *Eastern R. R. Co. v. Benedict*, 5 Gray, 566; *Beckham v. Drake*, 9 M. & W. 79. That Hurlburd had oral authority from the defendant to enter into a contract for the purchase of the land, and that he was acting for the defendant in making it is admitted; and if the contract had been a simple contract and not a specialty the defendant would, I think, have been bound by it within the authorities cited. No question would arise under the statute of frauds, for the statute prescribing what shall be necessary to make a valid contract for the sale of lands requires only that the contract, or some note or memorandum thereof expressing the consideration, should be in writing and subscribed by the party by whom the sale is to be made, or his agent lawfully authorized: 2 R. S. 135, §§ 8, 9. In this case the contract was signed by the vendors, and even if it had been executed on their part by an agent pursuant to an oral authority, it would have been a valid execution within the statute: *Lawrence v. Taylor*, 5 Hill, 113; *Worrall v. Munn*, 1 Seld, 229. But the vendee's contract need not be in writing: *McCrea v. Purmort*, 16 Wend. 469.

We return, then, to the question originally stated: Can a contract, under seal, made by an agent in his own name for the purchase of land, be enforced as the simple contract of the real principal when he shall be discovered? No authority for this broad proposition has been cited. There are cases which hold that when a sealed contract has been executed in such form, that it is, in law, the contract of the agent and not of the principal; but the principal's interest in the contract appears upon its face, and he has received the benefit of performance by the other party, and has ratified and confirmed it by acts *in pais*, and the contract is one which would have been valid without a seal, the principal may be made liable in *assumpsit* upon the promise contained in the instrument, which may be resorted to to ascertain the terms of the agreement: *Randall v. Van Vechten*, 19 J. R. 60; *Du Bois v. The Del. & Hud.*

Canal Co., 4 Wend. 285 ; Lawrence v. Taylor, 5 Hill, 107 ; see, also, Evans v. Wells, 22 Wend. 324 ; Worrall v. Munn, *supra* ; Story on Agency, § 277 ; 1 Am. Lead. Cas. 735, note.

The plaintiff's agreement in this case was with Hurlburt and not with the defendant. The plaintiff has recourse against Hurlburt on his covenant, which was the only remedy which he contemplated when the agreement was made. No ratification of the contract by the defendant is shown. To change it from a specialty to a simple contract, in order to charge the defendant, is to make a different contract from the one the parties intended. A seal has lost most of its former significance, but the distinction between specialties and simple contracts is not obliterated. A seal is still evidence, though not conclusive, of a consideration. The rule of limitation in respect to the two classes of obligations is not the same. We find no authority for the proposition that a contract under seal may be turned into the simple contract of a person not in any way appearing on its face to be a party to or interested in it, on proof *de hors* the instrument, that the nominal party was acting as the agent of another, and especially in the absence of any proof that the alleged principal has received any benefit from it, or has in any way ratified it, and we do not feel at liberty to extend the doctrine applied to simple contracts executed by an agent for an unnamed principal so as to embrace this case. The general rule is declared by SHAW, C. J., in *Huntington v. Knox*, 7 Cush. 374 : "Where a contract is made by deed, under seal on technical grounds, no one but a party to the deed is liable to be sued upon it, and therefore if made by an attorney or agent it must be made in the name of the principal in order that he may be a party, because otherwise he is not bound by it."

The judgment of the General Term should be affirmed.

Judgment affirmed.

Stinchfield v. Little, 1 Greenl. (Me.) 231 ; *Elwell v. Shaw*, 16 Mass. 42 ; *McClure v. Herring*, 70 Mo. 18 ; *Knight v. Clark*, 48 N. J. L. 22.

3

TORTS OF THE AGENT.

The principal is liable in tort for the agent's wrongful act if committed within the scope of his employment.

NOBLE *v.* CUNNINGHAM.

Supreme Court of Illinois, 1874.

74 Ill. 51.

CRAIG, J. This was an action on the case, brought by John Cunningham, in the Superior Court of Cook County, against appellants, John T. Noble and Francis B. Little, to recover for an injury received, resulting in the loss of a hand, caused by the moving of a car on the side track of the Illinois Central Railroad Company, in the city of Chicago, by the servants of appellants.

A trial of the cause was had before a jury, which resulted in a verdict and judgment in favor of appellee for \$3,000.

The appellants insist first, that the verdict is unsupported by the evidence.

We have carefully considered the testimony contained in the record, and find it ample upon which to base the verdict of the jury.

At the time appellee was injured he was a laborer in the employ of the Illinois Central Railroad Company; two cars were standing together on a side track of the company; he went under one of them for the purpose of making some repairs; before doing this, however, he placed a man by the side of the car to keep watch and notify him should any other car or engine approach; several feet north of the car to be repaired, upon the same track, stood a number of cars, also three cars were standing some distance south.

Appellants, who kept a lumber yard in Chicago, on the morning of the accident sent three of their hired men with lumber to the railroad to be carred and shipped. The car to be loaded was one of the number standing on the track, north

of where appellee was at work. The servants of appellants, in order to facilitate the loading of the car, undertook to move the cars between the one they desired to load and the car where appellee was at work, further south in the direction of appellee. They hitched a span of horses to the first car to be moved and started it, but when in motion they were unable to control it, and before appellee had any notice of the approach of the car, it struck the one adjoining the car appellee was repairing, which moved it forward and crushed appellee's hand.

The railroad company had in its employ a man provided with an engine, whose duty and business it was to move all cars when necessary to accommodate its patrons.

It is claimed application was made to the agent to move the car, and the engine provided for that purpose was then in use, and the three servants of appellants were directed by the agent to move the cars themselves; this, however, was denied by the agent.

But independent of this fact, if the servants of appellants undertook to move the car, they were bound to exercise proper care and caution, and if they failed to observe this duty, and appellee was injured, when in the exercise of due care, through the neglect and want of ordinary care on the part of the servants of appellants, the damages sustained by appellee must be visited upon appellants.

There is no pretense that appellee failed to observe due care and caution at the time of the accident. The controverted question is whether appellants' employees were guilty of negligence. They set in motion the car without making any provision whatever for stopping it; the brake upon it was out of order and could not be used. This they failed to examine. No blocks were permitted to be used in stopping the car; no examination was made to see if any person was under or about the cars the one moved was bound to come in collision with. In fact no precautions were taken to guard against danger. Under such circumstances the facts before the jury were sufficient to justify them in arriving at the conclusion

that the negligence of appellants' servants was the cause of the injury.

It is, however, urged that appellants are not liable for the negligence of their servants in moving the car.

The general rule is, that the principal is liable for the torts of his agent, done in the course of his employment, although the principal did not authorize, or justify, or participate in, or even if he disapproved them. If the tort is committed by the agent in the course of his employment while pursuing the business of his principal, and is not a willful departure from such employment and business, the principal is liable, although done without his knowledge.

The three men who moved the car were in the employ of appellants. They were sent to the railroad to load a car with lumber; for the purpose of doing the act they were sent and directed to do, they undertook to move the car. The act of moving the car was a part and parcel of loading the other; it was not only no departure from the employment, but will be regarded in the direct course of the employment.

It is insisted that it was error for the Court to permit proof that an agent of the railroad company said to the servants of appellants, after the accident, that they should never load a car in the yard again. Even if the evidence was improper, its admission had no tendency to prejudice the appellants. The same may be said in regard to the declaration of the witness Remsey, to which objection was made.

It is also urged by the counsel of appellants, in a very elaborate and ingenious argument, that the instructions given for appellee were improper, and that the Court erred in refusing certain instructions asked by appellants.

While some of the instructions given may be liable to slight technical objections, yet we fail to perceive any substantial error in the law, as given by the Court to the jury.

The instructions placed the case fairly before the jury. They contained nothing calculated to mislead, and after a careful consideration of the whole record, we are satisfied it

contains no substantial error. The judgment will therefore be affirmed.

Judgment affirmed.

State v. Smith, 78 Me. 260; *Guille v. Swan*, 19 Johns. 382; *Eaton v. Railway*, 59 Minn. 520.

E

LIABILITIES OF THIRD PARTIES TO AGENTS.

1

WHEN CONTRACT IS IN AGENT'S NAME.

If the contract by its terms is made with the agent personally he may enforce it.

COLBURN *v.* PHILLIPS.

Supreme Judicial Court of Massachusetts, 1859.

13 Gray, 64.

HOAR, J. The plaintiff made a written contract with the defendants to ship two hundred tons of stone from Phillips' Wharf in Salem to Norfolk, Va., at the rate of \$1.75 a ton, as soon after they were received as a vessel could be procured, to be delivered in Norfolk, to the order of Gault & Brother; the plaintiff not to be liable for any expenses at Salem, except the freight as above specified. The plaintiff in his declaration alleges in substance that he made the contract on behalf and for the benefit of the firm of Gault & Brother, and their assigns, Gault & Christy; that he delivered the stone at Phillips' Wharf; but that the defendants did not ship it at the price agreed, but at a higher price; and that Gault & Christy paid the higher rate, under protest, on a part of the stone, and on the rest were compelled to pay it by process of Court of the Admiralty, with divers costs, expenses, and counsel fees.

The defendants file an answer, denying some of the material allegations of the declaration; and insert in their answer a demurrer, which now comes before us for adjudication.

Four causes of demurrer are assigned. 1. That by the plaintiff's own showing the only cause of action belongs to Gault & Christy, and not to the plaintiff. In support of this it has been argued on the part of the defendants, that a promise made expressly to one who is only the agent of another, from whom the consideration wholly moves, will not support an action in the name of the agent. Undoubtedly some support to this doctrine can be found in the *dicta* of judges in several reported cases, and there seems to be some confusion and inconsistency upon the subject in the cases themselves. But upon a careful examination it may appear, that while the reasons given for some of the decisions cannot be well reconciled, the decisions are for the most part harmonious, and can be sustained upon sound principles.

In *Gilmore v. Pope*, 5 Mass. 491, which was an action upon a subscription for shares in a turnpike company, with a promise to pay the assessments to the plaintiff, who was an agent of the company, the plaintiff was non-suited, and PARSONS, C. J., said : "The action cannot be maintained in the name of a mere agent of the corporation, as in this transaction the plaintiff has alleged himself to be ; there being no consideration, as between the agent and subscribers, to support an action of *assumpsit*." This remark of the Chief Justice would seem to assume that, to support a promise, the consideration must always move from the party to whom the promise is made. On examining the case, the promise is found to be a part of a contract to take and pay for shares in the turnpike road, in consideration of being admitted as associates in the corporation. This is very clearly a contract with the corporation. The promise is to pay the assessments to Gilmore or order ; but there is not in terms any promise to Gilmore himself. The apparent purport, then, as well as the legal effect of the instrument, was an agreement with the corporation from whom the consideration proceeded. It would therefore stand as a promise to A, upon a consideration received from A, to pay a sum of money to B ; upon which it is now well settled in this Commonwealth that B can maintain no action,

except under certain peculiar and limited conditions : *Mellen v. Whipple*, 1 Gray, 317 ; *Field v. Crawford*, 6 Gray, 116 ; *Dow v. Clark*, 7 Gray, 198.

In *Buffum v. Chadwick*, 8 Mass. 103, the Court decided, that where a note was made to the plaintiff, describing him as agent of the Providence Hat Manufacturing Company, the action could be maintained by him, although the objection was suggested that he was a mere agent, and that the consideration moved from the company alone. They distinguish the case of *Gilmore v. Pope*, which was cited by the defendants' counsel, and observe that in that case "the contract was directly with the corporation."

In the case of *Commercial Bank v. French*, 21 Pick. 486, it was decided, that a promissory note made to "the cashier of the Commercial Bank," the note being the property of the bank, was a contract with the bank, on which the corporation might sue. *Gilmore v. Pope* is cited as sustaining the decision ; but the case rests upon the doctrine that, by a just construction of the language used, as terms of description, the contract was made with the bank.

In *Eastern Railroad v. Benedict*, 5 Gray, 561, it was determined that upon an order payable "to D. A. Neale, president of the Eastern Railroad Company," the corporation, being the real party in interest, might sue in its own name. The authorities were fully examined and discussed, and we are satisfied with the correctness of the decision ; but no question arose in that case whether the action might not have been maintained, if brought in the name of the payee.

In *Gunn v. Cantine*, 10 Johns. 387, the action was upon a receipt given to an attorney, upon an undertaking to collect the money due upon a contract belonging to his principal ; but the Court notice the fact that there was no express promise to pay the money collected to the attorney ; and only decide that the promise implied by law from the instrument was to the principal ; a view consistent with that which we have suggested in regard to the case of *Gilmore v. Pope*.

There is a class of cases in which it has been held that a

promise to a public officer, in his official capacity, must be enforced by a suit in the name of the public body for which he acts : *Pigott v. Thompson*, 3 Bos. & Pul. 147 ; *Irish v. Webster*, 5 Greenl. 171 ; *Garland v. Reynolds*, 20 Maine, 45. The principle is analogous to that which holds that one who signs a contract as a public officer is not personally responsible upon it ; though the ground upon which it is put is, that a just construction of the contract makes it the contract of the principal.

In *Thatcher v. Winslow*, 5 Mason, 50, Mr. Justice STORY held, that an agent, not having any legal or equitable interest in a promissory note, cannot sue as indorsee upon it. The only authorities which he names in support of the doctrine, are *Gunn v. Cantine* and *Gilmore v. Pope*, before cited. If the effect of the decision is merely this, that putting a promissory note into the hands of an agent, indorsed in blank, without any authority express or implied to him to bring a suit upon it, will not constitute such a transfer of the note to him as will support an action upon it in his name, we have no doubt of its correctness : *Sherwood v. Roys*, 14 Pick. 172.

But in *Story on Agency*, § 394, it is said that " if a negotiable note is indorsed in blank, and sent by the owner to his agent for collection, the agent may sue thereon in his own name as indorsee ;" and in § 161, that, " if an agent should procure a policy of insurance in his own name, for the benefit of his principal, the agent, as well as the principal, may sue thereon." In §§ 392, 393, 395, 396, the doctrine is stated in the broadest terms, that whenever the contract is made in writing expressly with the agent, and imports to be a contract personally with him, and also where he is the only known or ostensible principal, and therefore is, in contemplation of law, the real contracting party, he may sue in his own name. And such is the general current of the authorities ; and we are satisfied that, to support an action upon an express promise, it is in general immaterial whether the consideration move from the promisee or from another.

In *Baxter v. Read*, cited in *Dyer*, 272 b, note, it was " adjudged, that where Baxter had retained Read to be miller to

his aunt, at ten shillings per week, this will support an action on the case; for although it is not beneficial to Baxter, it is chargeable to Read."

In *Goodwin v. Willoughby*, Pop. 178, DODERIDGE, J., says: "If a stranger saith, 'Forbear such a debt of J. S. and I will pay it,' it is a good consideration for the loss to the plaintiff."

In *Sargent v. Morris*, 3 B. & Ald. 277, it was held, that the consignee could not sue for damage to goods shipped on board the defendant's vessel, the consignee being only the agent of the consignors, and having no present interest in the goods at the time of the injury. But there the bill of lading stated the receipt of the goods from the consignors, and undertook "to deliver the same to you, and in your name, according to custom and usage, to Mr. Sargent or his assigns, paying freight," etc.

In *Sims v. Bond*, 5 B. & Ad. 393, and 2 Nev. & Man. 616, Lord DENMAN asserts, that "it is a well-established rule of law, that where a contract, not under seal, is made with an agent in his own name, for an undisclosed principal, either the agent or the principal may sue upon it."

In the case at bar, the contract was with the plaintiff in his own name, no other principal was disclosed, and it was executed on his part. We think the promise of the defendants was upon a sufficient consideration, and may be enforced by the person to whom it was expressly made.

2. It is said the declaration does not charge the defendants with the direct consequence of their breach of agreement, but for an excess of freight paid by the plaintiff. The contract and the breach of contract are expressly set forth. The damages occasioned thereby may or may not be correctly claimed or estimated, and it is no cause of demurrer.

3. It is objected that the declaration charges the defendant with the costs and expenses of the suit in admiralty. But this is only a statement, in part, of the damages; and although mistaken, does not affect the right to maintain the action.

4. The declaration does not state any demand upon the defendants for an allowance for the excess of freight, or a demand

on them for the stone. No such statement is necessary. The gist of the action is the omission to furnish a vessel to carry the stone at the agreed price. When the defendants had shipped the stone at a higher rate, they had broken the contract declared on.

Demurrer overruled, and case remitted.

Clap v. Day, 2 Greenl. (Me.) 305; *Van Staphorst v. Pearce*, 4 Mass. 258; *Ludwig v. Gillespie*, 105 N. Y. 653; *U. S. Tel. Co. v. Gildersleve*, 29 Md. 232; *Goodman v. Walker*, 30 Ala. 482; *Rhoades v. Blackiston*, 106 Mass. 334; *Rowe v. Rand*, 111 Ind. 206.

The principal may also sue upon these contracts: *Yates v. Foote*, 12 Johns. (N. Y.) 1; *Dancer v. Hastings*, 4 Bing. 2 (13 Eng. Com. Law, 371).

An agent having a special property or interest in his principal's goods may sue for injuries to this property: *Fitzhugh v. Wiman*, 9 N. Y. 559; *Little v. Fossett*, 34 Me. 545.

F

LIABILITIES OF THIRD PARTIES TO PRINCIPAL.

Save in the case of specialties, if the contract is made for and in behalf of the principal, though not in his name, he is entitled to all the rights arising therefrom and may enforce the same.

HUNTINGTON v. KNOX.

Supreme Judicial Court of Massachusetts, 1851.

7 Cush. 371.

SHAW, C. J. This action is brought to recover the value of a quantity of hemlock bark, alleged to have been sold by the plaintiff to the defendant, at certain prices charged. The declaration was for goods sold and delivered, with the usual money counts. The case was submitted to a referee by a common rule of Court, who made an award in favor of the plaintiff, subject to the opinion of the Court on questions reserved, stating the facts in his report, on which the decision of those questions depends.

The facts tended to show that the bark was the property of the plaintiff; that the contract for the sale of it was made by

her agent, George H. Huntington, by her authority ; that it was made in writing by the agent, in his own name, not stating his agency, or naming or referring to the plaintiff, or otherwise intimating, in the written contract, that any other person than the agent was interested in the bark.

Objection was made, before the referee, to the admission of 'parol evidence, and to the right of the plaintiff to maintain the action in her own name. The referee decided both points in favor of the plaintiff, holding that the action could be maintained by the principal and owner of the property, subject to any set-off, or other equitable defence, which the buyer might have, if the action were brought by the agent.

The Court are of opinion, that this decision was correct upon both points. Indeed they resolve themselves substantially into one ; for *prima facie*, and looking only at the paper itself, the property is sold by the agent, on credit ; and in the absence of all other proof, a promise of payment to the seller would be implied by law ; and if that presumption of fact can be controverted, so as to raise a promise to the principal by implication, it must be by evidence *aliunde*, proving the agency and property in the principal.

It is now well settled by authorities, that when the property of one is sold by another, as agent, if the principal give notice to the purchaser, before payment, to pay to himself, and not to the agent, the purchaser is bound to pay the principal, subject to any equities of the purchaser against the agent.

When a contract is made by deed under seal, on technical grounds, no one but a party to the deed is liable to be sued upon it ; and therefore, if made by an agent or attorney, it must be made in the name of the principal, in order that he may be a party, because otherwise he is not bound by it.

But a different rule, and a far more liberal doctrine, prevails in regard to a written contract not under seal. In the case of *Higgins v. Senior*, 8 Mees. & Welsb. 834, it is laid down as a general proposition, that it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the con-

tract of sale, so as to give the benefit of the contract, on the one hand to, and charge with liability on the other, the unnamed principals; and this whether the agreement be or be not required to be in writing, by the statute of frauds. But the Court mark the distinction broadly between such a case and a case where an agent, who has contracted in his own name, for the benefit, and by the authority of a principal, seeks to discharge himself from liability, on the ground that he contracted in the capacity of an agent. The doctrine proceeds on the ground that the principal and agent may each be bound; the agent, because by his contract and promise he has expressly bound himself; and the principal, because it was a contract made by his authority for his account: *Patterson v. Gandasequi*, 15 East, 62; *Magee v. Atkinson*, 2 Mees. & Welsb. 440; *Trueman v. Loder*, 11 Ad. & El. 589; *Taintor v. Prendergast*, 3 Hill, 72; *Edwards v. Golding*, 20 Verm. 30. It is analogous to the ordinary case of a dormant partner. He is not named or alluded to in the contract; yet as the contract is shown in fact to be made for his benefit, and by his authority, he is liable.

So, on the other hand, where the contract is made for the benefit of one not named, though in writing, the latter may sue on the contract, jointly with others, or alone, according to the interest: *Garrett v. Handley*, 4 B. & C. 664; *Sadler v. Leigh*, 4 Campb. 195; *Coppin v. Walker*, 7 Taunt. 237; *Story on Agency*, § 410. The rights and liabilities of a principal, upon a written instrument executed by his agent, do not depend upon the fact of the agency appearing on the instrument itself, but upon the facts; 1, that the act is done in the exercise, and 2, within the limits, of the powers delegated; and these are necessarily inquirable into by evidence: *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326.

And we think this doctrine is not controverted by the authority of any of the cases cited in the defendant's argument. *Hastings v. Lovering*, 2 Pick. 214, was a case where the suit was brought against an agent, on a contract of warranty upon a sale made in his own name. The case of the United States

v. Parmele, Paine, 252, was decided on the ground that, in an action on a written executory promise, none but the promisee can sue. The Court admit that, on a sale of goods made by a factor, the principal may sue.

This action is not brought on any written promise made by the defendant; the receipt is a written acknowledgment, given by the plaintiff to the defendant, of part payment for the bark, and it expresses the terms upon which the sale had been made. The defendant, by accepting it, admits the sale and its terms; but the law raises the promise of payment. And this is by implication, *prima facie*, a promise to the agent; yet it is only *prima facie*, and may be controlled by parol evidence that the contract of sale was for the sale of property belonging to the plaintiff, and sold by her authority to the defendant, by the agency of the person with whom the defendant contracted.

We are all of opinion that the provisions of Rev. Sts. c. 28, § 201, do not apply to the sale of bark, as made in this case.

Judgment on the award for the plaintiff.

Mechanics' Bank v. Bank of Columbia, 5 Wheat. 326; *Higgins v. Senior*, 8 M. & W. 834; *Paterson v. Gandasequi*, 15 East, 62.

If the contract is under seal the action must be brought in the name of the agent: *Violet v. Powell*, 10 B. Mon. 347.

IV
OF THE MANNER OF TERMINATING THE
RELATION.

A
UNDER THE TERMS OF THE APPOINTMENT.

1

BY PERFORMANCE OF THE COMMISSION.

Performance by Agent.

The agency is terminated when the object is accomplished for which it was created.

MOON *v.* STONE.

Supreme Court of Iowa, 1875.

40 Iowa, 259.

MILLER, C. J. The evidence establishes the following state of facts: In the month of June, 1868, Mr. Scarlett applied to the plaintiff, who was then a member of the banking firm of Moore & McIntire, for the purpose of buying the land in controversy, if they had the agency. On being informed by plaintiff that they were not agents for the land, Scarlett said that Horace Everett, of Council Bluffs, was agent for the owner of the land. Plaintiff then examined and found the land in a printed list of lands for sale by Mr. Everett. Mr. Scarlett desired the plaintiff to buy the land for him at \$5 per acre. The plaintiff said he was going to Council Bluffs in a short time, and would see Mr. Everett and try and make the purchase. In a few days after this the plaintiff did see Mr. Everett, and bargained for the land as Scarlett desired him to do. About two weeks after this Scarlett again called at the banking house of Moore & McIntire, did not find

Moore in, but McIntire was there, and informed him that they had obtained the land for him. In a few days thereafter Scarlett called again and paid one-half the purchase-money for the land, and received a written contract for a deed upon the payment of the balance. Scarlett then inquired of plaintiff how much he charged for his services. "He said, usually \$20, but in this case \$10 would do," and Scarlett then paid the same.

The plaintiff resided in Page County, where the business was transacted; Scarlett resided and the land was situated in Taylor County. Some time in the month of July, 1869, a Mr. Farrell called at the banking house of Moore & McIntire, and inquired if the deed to Scarlett for the land in controversy had been received by Moore & McIntire. He was told by them that it had not. The deed was afterward received, being sent by Everett to Moore & McIntire's banking house, to be delivered by them to Scarlett on payment of the balance of the purchase-money. On the 27th of August, 1869, Farrell again called, and plaintiff delivered the deed to him on receipt of the money due, which was remitted to Everett. In delivering the deed and receiving the last payment on the land Moore & McIntire both testify they were acting as agents of Mr. Everett, whom they charged the usual collection fee of one-half of one per centum.

The evidence farther shows that neither plaintiff nor McIntire had any knowledge, at the time they made the purchase for Scarlett, that there were any tax liens on the land. The firm of Moore & McIntire purchased the land at tax sale in October, 1868, and held the tax certificate at the time of the delivery of the deed to Scarlett, and did not make the fact known to him. In making such tax purchase this tract was not selected and purchased by itself, but was purchased at the same time with other lands as they were offered by the treasurer, regardless of the ownership, and without any inquiry, and paying no attention to the numbers, and at the time of the delivery of the deed to Scarlett they had no knowledge that they then held a certificate for the purchase of the land at tax

sale, except what was common to all persons from the records. They then held certificates of the same kind for from ten to twenty thousand acres, and their attention was not particularly called to this tract until after the treasurer's deed came into the hands of the plaintiff.

Upon these facts it is quite clear that the agency of the plaintiff, or of Moore & McIntire, for the purchase of the land for Scarlett, terminated at the time they delivered to him the written contract for a conveyance of the land on receipt of the one-half of the purchase-money and the payment of their fees for the services performed. When this was accomplished Moore & McIntire had done all that they or the plaintiff had been employed to do. They had made the purchase, as Scarlett had desired them to do, delivered to him the written contract sent to them for Scarlett, received the first payment as per agreement. This completed the services they had undertaken. Scarlett himself so regarded it, for when these things were done he inquired how much they charged him for their services, and on being informed as to the amount he paid the same. They had performed the business for which the agency had been constituted, and, by operation of law, the agency was terminated. See Story on Agency, § 499, and cases cited; 2 Kent's Com. *643, and cases cited. This was in July, 1868. The purchase of the land at tax sale by Moore & McIntire was not made until October of that year. At that time they were as free to purchase the same as any other persons. Their agency no longer existed; they had not undertaken to procure a good title for Scarlett nor to examine the title for him. The land was situated in another county from where the plaintiff resided; nothing was said to them about the title, and they might well suppose that Scarlett, since he resided near the land and desired to buy it, had examined or procured some one to examine the records in the county where the lands were situated.

It is also quite clear that the fact that the deed to Scarlett was sent by Everett to the banking house of Moore & McIntire for the purpose of being delivered upon payment of

the balance of the purchase-money, did not operate to revive the prior agency for the purchase of the land. In this transaction Moore & McIntire acted for and as agents of the grantor in the deed. There is no evidence that Scarlett procured the plaintiff, or his firm, to obtain the deed for him. On the contrary, it was sent by Everett to Moore & McIntire for the purpose of collecting the balance of the purchase-money then due. They performed that service for Everett and received their compensation from him.

It is equally clear that the plaintiff was not guilty of any fraud in failing to disclose the fact of the tax purchase by Moore & McIntire. Their relations were not such as required such disclosure to be made, especially when it is affirmatively shown that they had no actual knowledge that they held the certificate of purchase at the time they delivered the deed to Scarlett.

The decree of the Court below will be reversed, and a decree entered for plaintiff in this Court if he so elects, or the cause will be remanded for a decree to be entered in conformity with this opinion by the District Court.

Reversed.

Story, 499; 2 Kent Comm. 642; Walker v. Derby, 5 Biss. 184; Rothschild v. Burritt, 47 Minn. 28.

Performance by Another.

The object of the agency being accomplished by other means, the agency is terminated.

AHERN v. BAKER.

Supreme Court of Minnesota, 1885.

34 Minn. 98.

VANDEBURGH, J. The defendant, on the 9th day of September, 1884, specially authorized one Wheeler, as his agent, to sell the real property in controversy, and to execute a contract for the sale of the same. He in like manner on the same day empowered one Fairchild to sell the same land, the

authority of the agent in each instance being limited to the particular transaction named. On the same day, Wheeler effected a sale of the land, which was consummated by a conveyance. Subsequently, on the 10th day of September, Fairchild, as agent for defendant, and having no notice of the previous sale made by Wheeler, also contracted to sell the same land to this plaintiff, who, upon defendant's refusal to perform on his part, brings this action for damages for breach of the contract.

This is a case of special agency, and there is nothing in the case going to show that the plaintiff would be estopped from setting up a revocation of the agency prior to the sale by Fairchild. A revocation may be shown by the death of the principal, the destruction of the subject-matter, or the determination of his estate by a sale, as well as by express notice. The plaintiff had a right to employ several agents, and the act of one in making a sale would preclude the others without any notice, unless the nature of his contract with them required it. In dealing with the agent the plaintiff took the risk of the revocation of his agency: 1 Pars. Cont. 71.

Order affirmed, and case remanded.

Benoit v. Conway, 10 Allen, 528; *Gilbert v. Holmes*, 64 Ill. 548; *Walker v. Denison*, 86 Ill. 142; *Schlater v. Winpenny*, 75 Pa. St. 321.

2

BY LAPSE OF TIME.

An agency created to cover a definite period or to last until the happening of an event terminates at the expiration of the period or the happening of the event.

GUNDLACH *v.* FISCHER.

Supreme Court of Illinois, 1871.

59 Ill. 172.

THIS was an action of debt brought by Philip M. Gundlach and Jacob Esler, against George Fischer, Alexander H. Johnson, Thomas S. Pope, George Tribble, Philip Meter, Martin

Fischer, and Nicholas Muhlhauser. It appeared the defendant, George Fischer, had entered into an agreement in writing, by the terms of which he was to act as agent for the plaintiffs in the sale of certain machines, and the other defendants were his sureties in a bond, given to secure the faithful performance of his duties as such agent. This suit was brought to recover for an alleged failure, on the part of Fischer, to account for and pay over to the plaintiffs certain moneys received by him from the sale of machines, as required by the terms of the agreement. The defendants, Johnson, Pope, Meter, and Muhlhauser, were duly served with summons, and to the declaration Johnson and Pope filed a plea of *nil debet*, to which the plaintiffs added a *similiter*. Meter and Muhlhauser were defaulted. Upon a trial by jury a verdict was rendered in favor of the defendants, Johnson and Pope, for costs. Motion for new trial overruled, and jury empaneled to assess damages against Meter and Muhlhauser, defendants in default. Verdict for defendants, and final judgment entered against the plaintiffs for costs of suit, from which they prosecute this appeal.

The following is the article of agreement and bond sued on :

Article of Agreement, made and entered into, by, and between Gundlach & Esler, of Belleville, St. Clair County, and State of Illinois, and George Fischer, of Trenton, county of Clinton, State of Illinois, in manner and form following, to wit :

The said George Fischer agrees to act as agent for said Gundlach & Esler, for the sale of the Buckeye reaper and mower, and horse hay-rakes, and Grundlach's patent grain drill, manufactured by Gundlach & Esler, Belleville, Illinois.

The said agency shall extend over and in the vicinity of Trenton, county of Clinton, State of Illinois, in conformity with the terms and stipulations hereinafter expressed ; and the said Gundlach & Esler in consideration of the faithful performance by the said G. Fischer of the obligations by him hereinafter assumed, agree to furnish the said G. Fischer such number of machines as the said G. Fischer may be able to sell as their agent, prior to October 1, 1867 ; the said Gundlach

& Esler reserving to themselves the right, in case they shall not be able to fill his orders, to restrict him to such number of machines as they may be able to supply.

The said G. Fischer further agrees, in acting as such agent:

First. To sell no other machines or rakes but such as are furnished by Gundlach & Esler; and in making sales, to be governed by the instructions hereto annexed, and such as may be given by Gundlach & Esler from time to time, either in writing or print, and made part of this contract; and in no case to sell a machine, or any part thereof, to any person or persons not known by him to be perfectly good and responsible.

Second. To receive and take good care of all machines sent to him as such agent; to have them properly stored; to pay all freight and charges thereon; to do any and all business connected with the same, and putting them in successful operation. And should any machines remain unsold at the end of the season, to hold the same subject to the order of Gundlach & Esler, and deliver the same in as good order as when received; when required, to them or their authorized agent, free from any and all charges whatsoever, except for money advanced on freight.

Third. To attend to selling said machines and collecting and remitting all moneys to Gundlach & Esler promptly and at the time of each sale.

Fourth. To attend to collecting of, or to the obtaining of further security on or to the renewal of such notes as are not paid promptly at maturity. For performing the services herein enumerated the said Gundlach & Esler agree to pay the said Fischer ten dollars on each reaper sold, two dollars on each rake, and eight dollars for each drill, all sold and settled for as above, the same to be payable at the time and in the same proportion as the payments are made on the machines sold; the foregoing sum to include the compensation for receiving, storing, delivering, selling, collecting, remitting, and putting the machines in practical operation.

In testimony whereof, the parties hereunto set their hands and seals this 3d day of May, 1867.

GUNDLACH & ESLER. [L. s.]

GEORGE FISCHER. [L. s.]

Know all men by these presents, That we, the undersigned, and George Fischer, are held and firmly bound unto Gundlach & Esler, of Belleville, county of St. Clair, State of Illinois, in the full and just sum of fifteen hundred dollars (\$1,500) in lawful money of the United States, for which payment, well and truly to be made, we bind ourselves, and each and every of our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our hands and seals this third day of May, A. D. eighteen hundred and sixty-seven (1867).

The conditions of this obligation are such, that if the above said George Fischer, who has taken the agency for the sale of the above-named machines of the said Gundlach & Esler, for and within the said vicinity, and that he will justly and fairly account for, and properly discharge his duties thereof, and will pay over all moneys and notes for such machines that may come to his hands as such agent for Gundlach & Esler, then this obligation to be void; else to remain in full force and virtue.

Signed: GEORGE FISCHER. [L. s.]

A. W. JOHNSON. [L. s.]

T. S. POPE. [L. s.]

GEORGE TRIBLE. [L. s.]

PH. METER. [L. s.]

MARTIN FISCHER. [L. s.]

N. MUHLHAUSER. [L. s.]

Signed in the presence of ALFRED GUYOT. [L. s.]

PER CURIAM. A fair and reasonable construction of the agreement makes Fischer the agent of Gundlach & Esler, for the sale of machines, until the 1st of October, 1867. And the appellees, by their obligation, undertook for the faithful

discharge of all of Fischer's duties as such agent, and that he should account for and pay all moneys, notes, etc., to Gundlach & Esler, for property and for machinery received prior to that date. It appears, from the evidence, that he received machinery prior to the 1st day of October, 1867, amounting to \$2,023.92. For his faithful account of that sum his sureties are liable, but they are not for machines or property received after that date. The agreement only contemplated that he should act as agent up to that time, and, hence, the sureties only bound themselves that he should account for machinery received before that date.

The evidence, however, fails to show that Fischer has accounted for all the money and notes received on the sale of the machinery received before the 1st of October, 1867. Even by Fischer's evidence, it appears that there is some amount still due Gundlach & Esler for machinery received within the period for which the sureties were bound, and for whatever sum that may be so due they are liable, and the jury should have found that amount by their verdict. Fischer does not pretend that he had paid the full amount received for the sale of machinery so furnished him, and appellants' witnesses make the amount over \$200, after deducting the note sent him for collection after the 1st of October, and all payments. But allowing him a credit of all he claims, still he would owe them, for which his sureties would be liable, at least \$87 and interest. The evidence, as given in this transcript, shows at least that amount. We are clearly of opinion that the jury misunderstood the evidence and erred in the finding of the verdict, and the Court below should have granted a new trial. The judgment of the Court below is reversed and the cause remanded.

Judgment reversed.

Oregon Co. v. American Co., 35 Fed. Rep. 22; Danby v. Coutts, 29 Ch. Div. 500.

B

BY REVOCATION OF AUTHORITY.

It is within the power of the principal to withdraw his authority at any time and thereby terminate the relation.

WALKER *v.* DENISON.

Supreme Court of Illinois, 1877.

86 Ill. 142.

MR. JUSTICE SHELDON. This was a bill in chancery to set aside a deed made by the appellees to the appellant, conveying to her certain premises, being a house and two acres of land situate in Belvidere in this State. The deed was made under the following circumstances:

On November 6, 1867, Warren H. Pease, being the patentee with Hiram Knapp, under letters-patent from the United States, for an improved well-tube, gave to J. D. Walker, now deceased, and A. B. Peterson a power of attorney constituting them his attorneys to sell and dispose of all or any part of the States and territories granted to Pease and Knapp in the letters-patent. The power of attorney contained the two following clauses: "And said attorneys are to account to me for one-half of the net proceeds derived from the above sales, after deducting all necessary expenses therefrom." "And this power of attorney is not revocable and cannot be revoked within two years from this date." The power of attorney was recorded in the Patent Office of the United States, November 13, 1867.

Under this power of attorney, Walker, on January 21, 1868, sold and conveyed to Daniel A. Denison, one of the appellees, the right to use and put down Pease's patent well-tubes for the State of Ohio, except Williams County, and gave \$50 in money, and a sample filter valued at \$5, for the premises described in the deed, and Denison and wife on that day executed to the appellant, Eunice E. Walker, the wife of J. D. Walker, the attorney, the deed in question. After the making of the power

of attorney, and before the consummation of the trade, namely, on November 21, 1867, Pease, the patentee, sold and assigned all his interest in the patent in and for the State of Ohio, except Williams County, to Delos A. Danforth and Charles W. Seeley, who were aware, at the time, of the existence of the power of attorney to Walker and Peterson. Such assignment was recorded in the Patent Office, November 27, 1867. At the time of the purchase from Pease, Danforth and Seeley purchased the Knapp interest in the patent from the widow and executrix of Knapp. Walker, the attorney, was notified by Pease of his sale and transfer of the patent to Danforth and Seeley, prior to January 21, 1868, the time of the execution of the deed.

The Court below decreed the relief prayed, and the defendant, Eunice E. Walker, appeals.

It is insisted that the sale by Walker, the attorney, to Denison, on January 21, 1868, was valid, notwithstanding the fact that Pease, the principal, had himself previously made sale of all his interest in the patent-right to Danforth and Seeley, because the power of attorney was irrevocable for two years, as expressed therein.

It is not disputed that the general rule is, that the principal may revoke the authority of his agent at his mere pleasure, although in its terms an authority may be expressly declared to be irrevocable; but it is contended that the present case comes within one of the recognized exceptions—that where an authority or power is coupled with an interest, or where it is given for a valuable consideration, or where it is part of a security, there it is irrevocable, and whether it is expressed to be so upon the face of the instrument conferring the authority, or not: Story on Ag., § 477. It is argued that Walker had an interest in the execution of the power; that it was given for a valuable consideration, to wit, that Walker was to give his time and labor and was to use his own money in introducing the patent, and was to be reimbursed only out of the sales he should make during the two years, and that as security for the reimbursement this stipulation against revocation for the

period of two years was inserted. All that there is shown in this respect is merely the above quoted provisions of the power of attorney. There is no undertaking on the part of Walker in the instrument, and aside from those clauses it is in the ordinary form of a simple power of attorney given by a principal. There was no proof that Walker was to incur any expenditure of any kind, or that he did incur any, beyond the one item of testimony that, during the latter part of 1867 and early part of 1868, he was engaged under the power of attorney in selling territorial rights for the patent.

The mention of "expenses," in the power of attorney, was not in the way of obligation on Walker to incur any, but was in connection with his compensation as attorney, and in measuring that he was to have one-half of the net proceeds of sales after deducting necessary expenses therefrom.

As to the exception of a power coupled with an interest, it is not enough, as appellant supposed, that the agent has an interest in the execution of the power. The meaning of that expression underwent discussion and was authoritatively determined in the case of *Hunt v. Rousmaniere's Administrator*, 8 Wheat. 174, where it was held that "a power coupled with an interest" is where the power or authority is coupled with an interest in the thing itself, actually vested in the agent; and that it was not an interest in that which is produced by the exercise of the power. The latter, and not the former, was all the interest of Walker in the matter, and the case cannot be brought within this exception.

Nor do we perceive that it any more falls within the other exceptions—of the instrument having been given for a valuable consideration, or as a part of a security. The power of attorney itself was not given for any such independent purpose. All that can be said in that regard is that the particular clause in the instrument against revocation might be beneficial to the agent appointed, in the way of profit derivable from the exercise of the agency, and of securing compensation for any services and expenditure therein. We do not consider that any such consideration or security respecting the mere benefit

to the agent from the exercising of the power should, at least under the circumstances here, debar from revoking the power. For any legal injury Walker may have sustained from the revocation he may have his remedy upon the covenant not to revoke.

The owner of the patent-right, Pease, having sold all his interest in it before the sale by the agent, Walker, to Denison, that was a revocation of the power of attorney by operation of law, the power of the principal having ceased over the subject-matter.

The sale made by Walker to Denison was without right and authority, and the conveyance of the house and lot from Denison, made thereon, was without consideration. Walker knew at the time that his principal had previously sold to Danforth and Seeley all that he pretended to sell to Denison, and the sale was not made in good faith. The Court below rightly granted relief and decreed a reconveyance.

In making the objection of the non-return of the \$50 received from Walker, appellant's counsel must have overlooked the recital in the decree that it was stipulated by the solicitors of the parties, in open court, that the net use of the premises was more than sufficient compensation to repay the cash payment of \$50. This obviates the objection.

The point is made, too, of laches, in the delay in bringing suit—the bill having been filed March 29, 1870. This objection does not appear to have been in any way raised in the Court below. In *School Trustees v. Wright*, 12 Ill. 432, which has never been overruled, this Court decided that this objection must be raised in the Court below, otherwise it must be held to have been waived.

The decree will be affirmed.

Decree affirmed.

Rowe v. Rand, 111 Ind. 206; *Chambers v. Seay*, 73 Ala. 373; *Hoover v. Perkins*, 41 Minn. 143; *Hunt v. Rousmanier*, 8 Wheat. 201; *Simonton v. Bank*, 24 Minn. 216; *Blackstone v. Buttermore*, 53 Pa. St. 266.

EXCEPTION—AGENCY COUPLED WITH INTEREST.

An agency coupled with an interest in the subject-matter is not revocable at the will of the principal.

HOUGHTALING *v.* MARVIN.

Supreme Court of New York, 1849.

7 Barb. 412.

THIS action was brought by the plaintiff as administrator *de bonis non* of the estate of Isaac Wilcox, deceased, to recover a sum of money alleged to have been received by the defendant to and for the use of the estate. The intestate was a stockholder in the Cohecton and Great Bend Turnpike Company, and in the spring of 1842, several years after his decease, there was standing to his credit, upon the books of the company, \$76 for dividends upon his stock for the two years preceding. On the 6th of April, 1842, Zera E. Hayden, the administrator, drew for the amount upon the treasurer of the company in favor of the defendant, payable to him or his order, and on the 22d of May the defendant acknowledged the receipt of a certificate of deposit in the Broome County Bank, for the amount. On the 25th of the same month he received \$75 for the certificate, at the Syracuse Bank. The administrator, Hayden, died on the 18th of April, 1842. It was proved that in March or April, 1842, the administrator talked of going to Cohecton to get the money, and wanted it to pay one Tyler, and that the defendant, who was his son-in-law, told him that he could get the money more cheaply by writing, and proposed to write for him. The defendant also proved by Tyler that in the spring of 1842, Hayden was indebted to him upon a note past due, and came to him with the defendant, and desired him to wait for his pay until he got the turnpike stock money from Pennsylvania, and said if he could not wait he would get the defendant to send him some money. And that the defendant told him if he could not wait, to send to him, at Baldwinsville, and he would send him up some money, and that he sent down and got \$30 or \$40, and in June the defendant paid the balance. The whole amount

was about \$70. The cause was tried before Justice C. Gray, on the Onondaga circuit. The jury, under the charge of the Court, rendered a verdict for the defendant, and the plaintiff moved for a new trial, upon a case.

ALLEN, J. It is very clear, from the evidence, that the bill or order of the administrator Hayden upon the treasurer of the turnpike company, for the dividends upon the stock of the intestate, was not intended as an absolute transfer of the fund to the defendant. It was an authority to him to receive the money; and unless it was a power coupled with an interest in the defendant or some other person, the authority was revoked by the death of the principal (Hayden) before the receipt of the money, and the defendant, upon its receipt, became a trustee for the representatives of the estate of Wilcox. The interest which will authorize the execution of the power, after the death of the principal, must be an interest in the thing itself which is the subject of the power, and not in the proceeds or avails of such thing: *Hunt v. Rousmanier's Executors*, 8 Wheat. 174. If there is merely a power to a creditor to receive a debt expressly for the purpose of liquidating the claim of the creditor, unaccompanied, however, by an actual assignment of the debt or by any security to which the power might have been ancillary, it is revoked by the death of the principal: *Lepard v. Vernon*, 2 V. & B. 51; *Paley on Agency*, by Dunlap, 186; *Story on Bailm.*, § 209; *Story on Agency*, §§ 488, 489.

In this case the legal title to the fund in the hands of the treasurer of the turnpike company was by the order of Hayden vested in the defendant to the amount advanced by him upon the faith of such order. The order itself, without consideration, was a naked power to receive the money for the use of the drawer, and was revocable at his pleasure, or by his death. But if the defendant paid or advanced money to Hayden and took the order as a security for the sum so paid or advanced, then, to that amount the order operated to transfer the fund, and became a power coupled with an interest, which survived

the drawer: *Knapp v. Alvord*, 10 Paige, 205; *Tate v. Hilber*, 2 Ves. 111. It can make no difference that Hayden was acting as administrator. Having funds belonging to the estate, at a place distant from his residence, he had the right to transfer them in this manner, with a view to realize them at the point where they were wanted for the purpose of administration. The mere fact that Hayden drew the bill as administrator, in favor of a third person who was willing to discount it, or advance the money upon it, would not, of itself, be evidence of a *devastavit*, or charge the drawer of the bill with the receipt of moneys to the use of the estate. Whether the defendant did advance money to Hayden upon the faith of the security furnished by the bill, and take and rely upon the bill as such security, and if so, to what amount, does not very distinctly appear; although, had that question been put to the jury and they had found in favor of the defendant, to the amount paid by him to Tyler before the death of Hayden, perhaps the verdict could not have been set aside as against evidence. But the amount paid to Tyler, after the death of Hayden, was paid by the defendant without authority, and in his own wrong. He was the son-in-law of Hayden, living in the same neighborhood, and knew of his death. He says that he assisted in the settlement of his estate. He therefore cannot claim to have paid it in ignorance of his death, and to be protected within the principle of 2 Ves. 111; and *Smart v. Illery*, 10 Mees. & Wels. 1.

It cannot be claimed that for that amount the order was a power to the defendant coupled with an interest in himself or in Tyler, the creditor of Hayden. Not for his own benefit, for he had not paid the money to Tyler, nor had he become bound, as surety for Hayden, or otherwise, to pay it to him. Not for the benefit of Tyler, for the reason that there was no attempt to transfer the fund to him, or give him any pledge or lien upon it. Hayden, up to the time of his death, had complete control of this part of the fund, and if he had at any time directed the defendant to pay it to Tyler when received, he could, while living, have revoked the order; and it was revoked by his death. The

Justice charged the jury that if there was an arrangement between the defendant and Hayden by which he was to draw the money and pay it over to Tyler or retain it for advances made or to be made by him, for Hayden, and if he did draw and pay it over, in pursuance of such arrangement, then he was not liable. That if the jury found that there was such an arrangement the defendant might be regarded as the mere agent of Hayden in drawing and paying over the money, and that even if Hayden had not the right so to direct its disposition the defendant was not liable. This part of the charge was too broad, and should have been qualified. For if, as supposed, the defendant was the mere agent of Hayden to pay the money to Tyler, the agency ceased at the death of Hayden, and a payment after that time was without authority. And for the amount so paid the plaintiff was entitled to a verdict.

Without examining the other questions made upon the argument, a new trial must be granted; costs to abide the event.

Standard Oil Co. v. Gilbert, 84 Ga. 714; *Marziou v. Pioche*, 8 Cal. 522; *Missouri v. Walker*, 125 U. S. 339; *Hunt v. Rousmanier*, 8 Wheat. 174; *Hartley & Minor's Appeal*, 53 Pa. St. 212; *Chambers v. Seay*, 73 Ala. 372; *Story*, 488.

MODIFICATION—AGENCY PRESUMED TO CONTINUE.

One who has dealt with an agent has a right to presume in the absence of notice that the agency continues.

MCNEILLY *v.* CONTINENTAL LIFE INS. CO.

New York Court of Appeals, 1876.

66 N. Y. 23.

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department reversing an order non-suiting plaintiff on trial, and granting a new trial.

This action was brought upon a policy of life insurance issued by defendant upon the life of plaintiff's intestate, Isaac McNeilly.

The policy was issued June 22, 1870. It was obtained through one E. W. Weller, who, at the time, was general agent of defendant. To him the insured paid the premiums as they fell due up to December 22, 1873, receiving receipts therefor. By the terms of the policy the premiums became due and payable semi-annually on the 22d of June and December, or within thirty days thereafter. By the terms of Weller's agreement with defendant his agency expired May 26, 1874, and at that time he surrendered up the receipts then held by him, he having authority, however, and agreeing to receive and forward any premiums paid to him. Prior to June 22, 1874, defendant sent to the insured a notice by mail advising him that the premium fell due on the 22d of June. Across the face of the notice was stamped the words "Remit direct to the home office." It did not appear when the insured received this notice. On the 16th of July, 1874, the insured mailed to Weller a postal order payable to him for the amount of the premium. He had been accustomed to pay the premiums in the same manner, and they had been received without objection. At the time this order was received Weller was away from home. It was received by his daughter in accordance with instructions from her father, and she wrote the insured, acknowledging receipt and stating that a receipt would be sent upon return of her father. He returned home July 27 or 28, drew the money on the order, and procured a new order for amount, which he forwarded to defendant. Defendant wrote to the insured informing him of the receipt of the money, and stating as the premium was past due it would not accept it unless he would sign and return a certificate of health inclosed, and that meanwhile it would hold the draft or order subject to his order. The insured informed defendant that he could not sign the certificate, as he had been for some months in failing health. In September defendant inclosed to the insured the order received by it from Weller, who returned it. Upon the back of the policy was printed a notice to policy-holders, to the effect that no payment to an agent was valid without the production and delivery by him

of a receipt signed by the president, secretary, or actuary of the company. The insured died October 5, 1874.

At the close of the evidence on the trial defendant's counsel moved for a non-suit, which was granted. Plaintiff's counsel duly excepted. Exceptions were ordered to be heard at first instance at General Term. Further facts appear in the opinion.

ANDREWS, J. When the policy was issued Weller was the general agent of the defendant, and was authorized to take applications for insurance, appoint local agents, and receive original, or renewal premiums on policies issued by the company. In 1870 he took the application for insurance upon the life of the plaintiff's intestate, and the policy was issued June 22, 1870, countersigned by Weller as general agent. By the terms of the policy the premium was payable on the 22d day of June in each year, or within thirty days thereafter, and prior to 1874, premiums had been paid semi-annually to Weller, who received and remitted them to the defendant, and the company forwarded to Weller receipts therefor, which he delivered to the insured. On the 16th day of July, 1874, the insured mailed to Weller a postal money order for the semi-annual premium which fell due June 22, 1874. Weller was then absent from home, but his daughter, pursuant to his instructions, received the order, and informed the insured by letter that her father would send a receipt on his return. He returned home on the 27th or 28th of July, and drew the money on the order sent by the insured, and procured an order on the New York office for the amount of the premium, and sent it to the defendant. The defendant, on receiving the order, wrote the insured informing him of its receipt, and inclosing in the letter a certificate of health, and stating, in substance, that as the premium was past due the company would not accept it, except on condition that he would sign and return the certificate, and that, meanwhile, it would hold the draft subject to his order. The insured had, for several months, been in failing health; and he informed the defend-

ant that he could not for that reason make the statement contained in the certificate. Afterward, in September, the defendant returned the order to the insured, who again sent it to the company, and in October, of the same year, the plaintiff's intestate died.

The defense interposed by the company is that the policy was forfeited by the non-payment of the June premium. It was sent to Weller within the thirty days extension of time given by the policy. The defendant, to avoid the effect of this payment, relies upon the fact that the general agency of Weller terminated in April, and that notice was given to the insured, before the payment was made, to send the premium directly to the company.

A person who has dealt with an agent in a manner within his authority, has a right to assume, if not otherwise informed, that the authority continues, and when the dealing continues after the authority is revoked, the principal is nevertheless bound, unless notice of the revocation is brought home to the other party: Story on Ag., § 470. It was, therefore, essential for the defendant, in order to defeat the action, to show that the plaintiff's intestate, when he made the payment to Weller, in July, 1874, had notice that he was not authorized to receive it. To establish this the defendant proved that, early in June, it mailed to the insured a notice that the premium on his policy would fall due on the 22d of that month. This notice was partly printed and partly written, and across its face was stamped the words, "remit direct to the home office." When this notice was received by the insured does not appear. It was seen in his possession in August. This is all the evidence there is to show that the insured, when he sent the money order to Weller in July, knew that his authority was terminated. This evidence, at most, raised a question of fact for the determination of the jury. The notice made no reference to Weller, nor did it indicate that his agency had terminated. It is evident that he did not so understand it, for he had abundant time to have remitted the premium to the defendant's office, if he had supposed that

Weller had no right to receive it. Nor did the direction on the notice to send to the home office operate as notice of a special limitation of the previous authority vested in Weller. The direction was printed on a blank prepared for general use. The general direction to send to the home office would not fairly imply that payment to a general agent was prohibited. If it would convey to any one any intimation of this kind, it would not be likely to do so to persons unskilled in business, with whom, to a great extent, the business of life insurance companies is conducted. The language is, at least, vague and equivocal to convey the information claimed, and it is not too much to require that the defendant shall make a plain case when it claims a forfeiture. The objection that the money was remitted by post-office draft, is not tenable. The insured had paid his premiums in this way before, and Weller had accepted them as good payment, and the company made no objection on this ground. The authority given by Weller to his daughter to receive premiums falling due in his absence, was within the general scope of his agency, and payment to her was payment to him. The notice to policy-holders printed on the back of the policy, that payment to agents would not be deemed valid, unless a receipt, signed by the president, secretary, or actuary of the company was taken at the time, cannot be construed as a limitation of the power of a general agent. It was not a part of the contract of insurance, and payment to a general agent without the production of a receipt, is valid: *Boehen v. Williamsburgh City Ins. Co.*, 35 N. Y. 131; *Sheldon v. The Atlantic Ins. Co.*, 26 Ib. 460; *Shearman v. The Niagara Ins. Co.*, 46 Ib. 526. There is another answer to this objection. The agency of Weller, under his contract with the company, terminated on the 26th day of May, 1874, and on that day all receipts in his hands were delivered by him to the company. But his agency was continual for a special purpose, viz., to receive such premiums as should be paid to him thereafter, and forward them to the defendant, and under this authority he continued to receive premiums falling due, until October, and sent them to the

company pursuant to the arrangement. No receipts in advance were furnished to deliver to the persons paying the premium, nor was it contemplated that this should be done when the special authority was given to Weller. The claim, that Weller's special authority, after the termination of his general agency, was confined to receiving premiums in cases where receipts were furnished him in advance, is not, we think, supported by the proof. Upon the ground, therefore, of a special waiver by the company of the instruction contained in the notice to policy-holders, the payment made by the plaintiff's intestate was valid.

It is not claimed that the non-suit can be supported upon any grounds other than those we have considered, and for the reasons stated we are of opinion that they do not justify the direction given at the circuit.

The order appealed from should be affirmed, and judgment absolute ordered for the plaintiff on the stipulation.

Order affirmed, and judgment accordingly.

Baltimore v. Eschbach, 18 Md. 276; *Insurance Co. v. McCain*, 96 U. S. 84.

C

BY AGENT'S RESIGNATION OR REFUSAL TO ACT.

When the agency is not for a specific period of time the agent may renounce it at will.

BARROWS v. CUSHWAY.

Supreme Court of Michigan, 1877.

37 Mich. 481.

ACTION on a bond brought by plaintiffs in error as copartners, against Cushway as principal and Gardner as surety for the faithful performance of the following contract:

"Office of Thomas Barrows & Co., Chicago, Ill., Oct. 11, 1873. In consideration of Thomas Barrows & Co. making consignment of Victor sewing-machines to me, in such quan-

tities and at such times as they may elect, to be sold on their account at the regular retail prices. The machines to be properly packed and delivered in good order at any railroad depot or express office in the city of Chicago, as directed (after which all charges and expenses of every kind, including taxes and insurance, to be defrayed by me), and their paying me a commission for selling the said machines as follows, to wit: On sales made for cash, a commission of 45 per cent. On sales made for notes at six months, 40 per cent. And on the further consideration of their agreement to give me the right to sell Victor sewing-machines in the following territory, to wit: Ludington and vicinity, Mason County, Michigan, I agree to the following, to wit: To devote my attention exclusively to the sale of the said machine. Also to render the consignors in the prescribed form a statement of stock on hand as often as may be required. Also to keep the machines (unsold) in good order and condition, and return them to the consignors or order upon demand free of charge. I further agree to render a faithful report of all machines sold during the month, giving style and plate No. of each, and to give my note for the price of said machines sold, less 40 per cent., due six (6) months after date thereof, without interest, payable at some bank in Ludington, Mason County, Mich."

The contract was not signed at all, but the bond was signed by Cushway and Gardner. The remaining facts are shown in the opinion. Under the charge of the Court below, the jury found for the defendants, and plaintiffs brought error.

MARSTON, J. We do not consider it at all necessary to pass upon all the questions raised in this case. Admitting, for the purpose of this case, the contract between plaintiffs and Defendant Cushway to have been executed in such manner as to bind the latter, and that parol evidence would have been inadmissible to show that the agency was to be exclusive within the territory mentioned, points upon which we express no opinion, there was nothing in the contract which would bind Cushway to act as agent for any definite length of time, or which

would transfer or pass to him title to the sewing-machines shipped to him thereunder.

It appears, and the record states was undisputed, that the defendant requested one of plaintiffs' agents in the spring of 1875 to remove and take away the undisposed of machines then in his possession, and that he wrote the plaintiffs the 1st of May to like effect, but received no reply thereto. This he claims to have done upon the ground that they had violated their contract by appointing another agent to sell machines within the territory previously granted to the defendant. The reasons, however, are not of so much consequence. On the 14th of June defendant's store was destroyed by fire, and the machines then unsold, together with certain property of the defendant, were destroyed, and on the trial it was admitted by counsel for the respective parties "that the machines and fixtures thereto belonging, for which compensation is sought for in this action, were destroyed by the fire of June 14, 1875, and that such fire occurred without fault or negligence on the part of defendant Cushway." The Court charged the jury that "if they found Cushway gave plaintiffs notice a reasonable time before the fire to take their machines off his hands, he would, after the expiration of such reasonable time for removal, be answerable only for gross negligence, and that plaintiffs could not recover for machines destroyed by fire without fault or negligence on the part of Cushway after the lapse of such reasonable time."

Under the declaration and claim of the plaintiffs the charge here given was correct, and was, under the admitted facts, decisive of the case, and the other rulings of the Court, whether correct or not, could have had no material bearing.

The judgment must be affirmed with costs.

Conrey v. Brandegee, 2 La. An. 132; *Coffin v. Landis*, 46 Pa. St. 426; *United States v. Jarvis*, 2 Ware, 278; *De Briar v. Minturn*, 1 Cal. 450; *Franklin Co. v. Harris*, 24 Mich. 115.

D
BY OPERATION OF LAW.

1

DEATH OF PRINCIPAL OR AGENT.

Death of either principal or agent terminates the agency.

DARR *v.* DARR.

Supreme Court of Iowa, 1882.

59 Iowa, 81.

BECK, J. I. The District Court made no special findings, but, in our opinion, the evidence establishes the following facts:

1. Plaintiff is the only heir of Andrew Darr, a brother of defendant, who died in 1859 in Missouri.

2. In 1858 or 1859 defendant received the notes in controversy from plaintiff's father who was, at the time, about to remove to Missouri, with authority to collect them. The notes did not become due until after Andrew Darr's death. At the maturity of the notes, and for some time after, the makers of the notes were solvent.

3. Administration of Andrew's estate was allowed in Nebraska, and the notes were reported as assets of the estate there, and the administrator collected a part of one of these notes.

4. Plaintiff's grandfather was appointed his guardian in Missouri.

5. Defendant collected no part of the notes. In 1879 he delivered them to plaintiff, who then had reached his majority.

6. The makers of the notes are and have been for many years insolvent.

7. No demand was made upon defendant by the administrator of the estate of Andrew for the notes. In 1860 the grandfather of the plaintiff had some correspondence with de-

fendant, who suggested the appointment of a guardian in this State. It does not appear whether the grandfather at this time had been appointed guardian in Missouri.

II. These facts support the judgment of the District Court. Defendant's agency was terminated by the death of his brother, and afterward he had no authority to enforce the collection of the notes. They were assets of his brother's estate and should have gone into the hands of the administrator. Defendant is not liable for negligence in not causing the appointment of an administrator in this State.

There is no ground for holding defendant liable as an executor *de son tort*. He in no manner intermeddled in the affairs of the estate, and did not interfere to prevent the administrator recovering the possession of the notes, nor to prevent administration upon the estate in Iowa.

We conclude, the judgment of the District Court ought to be affirmed.

Yerrington v. Greene, 7 R. I. 589; Griggs v. Swift, 82 Ga. 392; Hunt v. Rousmanier, 8 Wheat. 174; Bishop Con. 1052; Mechem, 240, 249; Saltmarsh v. Smith, 32 Ala. 404; Gage v. Allison, 1 Brev. (S. C.) 495; Knapp v. Alvord, 10 Paige Ch. 205; Davis v. Windsor Bank, 46 Vt. 727.

Exception.—Death of mortgagor does not terminate mortgagee's power of sale: Conners v. Holland, 113 Mass. 50; Knapp v. Alvord, 10 Paige Ch. 205.

2

INSANITY OF PRINCIPAL OR AGENT.

The insanity of either principal or agent terminates the agency.

DAVIS v. LANE.

Supreme Court of New Hampshire, 1839.

10 N. H. 156.

ASSUMPSIT upon a promissory note.

It appeared in evidence that Foss, the plaintiff's intestate, for some time previous to his death, which happened in October, 1833, held a note against the defendant, for \$50; and on

the day of his decease, and when he was entirely senseless, and no hopes were entertained of his recovery, one Jeremiah Prescott, to whom Foss was indebted in the sum of about \$46, came, in company with the plaintiff, to the house of Foss, and, after some conversation, it was suggested to the wife of Foss that she had better give up to Prescott the note her husband had against the defendant, and pay the debt due him, which, after some hesitation, she concluded to do; upon which the amount due Prescott was deducted from the amount of the note against the defendant, and a note for \$4 or \$5 was given by Prescott, payable to Foss as a balance. The defendant afterward paid Prescott the amount of his note. This suit was brought to recover the amount of the note, on the ground that the wife of Foss had no authority to deliver up the note to Prescott and have it applied in the manner before mentioned.

There was evidence, on the part of the defendant, tending to show that for several years previous to this transaction Foss's wife had been his general agent for transacting all his business, and that she was authorized to settle this concern in the manner she did; but the plaintiff insisted that if she had been agent, the situation of Foss, at the time of the transaction, which was well known to her and the others concerned, operated in law as a revocation of her agency.

The Court charged the jury that if they were satisfied that the wife had been the general agent of her husband for several years previous, the situation in which he was placed when said business was transacted, although well known to her and Prescott, did not operate in law as a revocation of her agency. The jury returned a verdict for the defendant, and the plaintiff moved for a new trial.

PARKER, C. J. There is no pretense that a wife, as such, has any authority to dispose of the husband's goods, or adjust his affairs, by reason of his incapacity to transact business.

But it is contended, in this case, that the wife having had a general power to transact business for her husband previous to

his illness, nothing but an express revocation of that power, or some occurrence which divests and transmits the property, as death or bankruptcy, will terminate her authority to act as the agent of her husband, and that she therefore might well dispose of the note in question, notwithstanding her husband was utterly insensible and incapable of any volition whatever; and this well known to her, and to Prescott, to whom she passed it, and notwithstanding he continued in that state until his decease.

The authorities show that the death of the constituent terminates the authority, unless the power is coupled with an interest so that it may be executed in the name of the agent: *Harper v. Little*, 2 Green R. 18; *Hunt v. Rousmaniere's Adr.*, 2 Mason's R. 244; s. c., 8 Wheat. R. 174; *Waters v. King*, 4 Camp. 274; 2 Livermore on Agency, 302. So bankruptcy, on his part, operates as a revocation: *Parker v. Smith*, 16 East R. 386. So marriage of a single woman terminates a power to confess a judgment in her behalf: *Anon.*, 1 Salk. 399; 2 Livermore on Agency, 307.

In all these cases an end is put to the power of the principal to act, and, moreover, the operation of law transfers the estate, upon which the power might operate to the custody and control of others. In this latter respect these cases are unlike the one before us, and no authority has been cited or found which will directly settle the present case.

We are of opinion, however, that the authority of the agent, where the agency is revocable, must cease or be suspended by an act of Providence depriving the constituent of all mind and ability to act for himself, and that this doctrine can be sustained by very satisfactory principles.

An authority to do an act for and in the name of another presupposes a power in the individual to do the act himself, if present. The act to be done is not the act of the agent, but the act of the principal, and the agent can do no act in the name of the principal which the principal might not himself do, if he were personally present. The principal is present by his representative, and the making or execution of the

contract, or acknowledgment of a deed, is his act or acknowledgment.

But it would be preposterous, where the power is in its nature revocable, to hold that the principal was in contemplation of law, present, making a contract, or acknowledging a deed, when he was in fact lying insensible upon his death bed, and this fact well known to those who undertook to act with and for him. The act done by the agent, under a revocable power implies the existence of volition on the part of the principal. He makes the contract—he does the act. It is done through the more active instrumentality of another, but the latter represents his person and uses his name.

Farther, upon the constitution of an agent or attorney to act for another, where the authority is not coupled with an interest and not irrevocable, there exists at all times a right of supervision in the principal and power to terminate the authority of the agent at the pleasure of the principal. The law secures to the principal the right of judging how long he will be represented by the agent and suffer him to act in his name. So long as, having the power, he does not exercise the will to revoke, the authority continues.

When, then, an act of Providence deprives the principal of the power to exercise any judgment or will on the subject, the authority of the agent to act should thereby be suspended for the time being, otherwise the right of the agent would be continued beyond the period when all evidence that the principal chose to continue the authority had ceased, for after the principal was deprived of the power to exercise any will upon the subject, there could be no assent, or acquiescence, or evidence of any kind to show that he consented that the agency should continue to exist. And, moreover, a confirmed insanity would render wholly irrevocable an authority, which, by the original nature of its constitution, it was to be in the power of the principal at any time to revoke.

It is for these reasons that we are of opinion that the insanity of the principal, or his incapacity to exercise any volition

upon the subject, by reason of an entire loss of mental power, operates as to a revocation, or suspension for the time being, of the authority of an agent acting under a revocable power. If, on the recovery of the principal, he manifests no will to terminate the authority, it may be considered as a mere suspension. And his assent to acts done during the suspension may be inferred from his forbearing to express dissent when they came to his knowledge: 1 *Livermore on Agency*, 300; *Cairnes v. Bleecker*.

The act of the agent in the execution of the power, however, may not in all cases be avoided on account of the incapacity. If the principal has enabled the agent to hold himself out as having authority, by a written letter of attorney, or by a previous employment, and the incapacity of the principal is not known to those who deal with the agent, within the scope of the authority he appears to possess, the transactions may be held valid and binding upon the principal. Such case forms an exception to the rule, and the principal and those claiming under him may be precluded from setting up his insanity as a revocation, because he had given the agent power to hold himself out as having authority and because the other party had acted upon the faith of it and in ignorance of any termination of it. They would be so precluded in the case of an express revocation, which was unknown to the other party: 2 *Livermore on Agency*, 310; *Salte v. Field*, 5 D. & E. 215; 2 *Greenleaf's R.* 18. And a revocation by operation of law, on account of the insanity of the principal cannot have a greater effect than the express revocation of the party himself. But this case is not of that character. Here there was full knowledge of the situation of the plaintiff's intestate, by Prescott, when he received the note.

The principle that insanity operates as a revocation cannot apply where the power is coupled with an interest, so that it can be exercised in the name of the agent, for such case does not presuppose any volition of the principal at the time, or require any act to be done in his name, and is not revoked by his death.

Whether it is applicable to the case of a power which is part of a security, or executed for a valuable consideration, and thus is by its terms or nature irrevocable, and which seems to be regarded in England as a power coupled with an interest (10 Barn. & Cres. 731; 4 Camp. 272) may be a question of more doubt: 2 Mason, 249. Such a power could not be revoked by the principal, if his sanity was continued (2 Livermore, 308), and any volition of his could not alter the case. Some of the reasons, therefore, which have been adverted to, would not exist in a case of that character. But a power of that kind is to be executed in the name of the principal; and it was held, in *Hunt v. Rousmaniere's Administrator*, before cited, that the death of the principal operates as a revocation of it, for the reason that after that event no act can be done in his name, as if he himself performed it. This reason would not exist where he was still living; and perhaps he and others might in such case be precluded from setting up his insanity in avoidance of the act, on the ground that he would have had no right to interfere if sane, and had therefore no right to insist on his insanity as an objection.

It has been held, in England, that the insanity of one partner does not operate as a dissolution of the partnership, but that object must be attained through a court of equity: *Sayer v. Bennet*, cited 2 Ves. & Bea. 303; *Gow on Part.* [272]. But the soundness of the principle may perhaps be doubted: *Waters v. Taylor*, 2 Ves. & Bea. 303; *Griswold v. Waddington*, 15 Johns. R. 57, 82. It certainly could not have been applied here prior to 1832, as we had before that time no Court through whose decree in equity a dissolution could have been effected. Admitting it to be correct in its fullest extent, however, it would not affect this case, for each partner has an interest, by the partnership contract, and the interest of one partner would not be terminated by the insanity of another. In making a sale or contract he does not act as agent, but in his own right, and the partnership name may be used by one without any supposition that another acts individually or has any knowledge or volition in relation to the matter. But so

long as the partnership continues, the act of the one binds the others; and as it is, in its effect, the act of all the partners, it may deserve great consideration whether the insanity of one, in the absence of any stipulation to the contrary, does not operate *ipso facto* as a dissolution of the partnership itself.

The result of the view we have taken is that the wife of the intestate had at the time no authority to dispose of this note to Prescott, and that he acquired no title to it, and had no right to receive the money. We have already held, on a former case, in this suit, that a payment to him, by the defendant, under such circumstances, could not operate to discharge the note: 8 N. H. Rep. 224. The instructions to the jury were erroneous, but there is no agreement in the case by which we are authorized to enter judgment for the plaintiff, and the action must, therefore, be transferred to the Common Pleas for a new trial, if there is anything further in controversy between the parties.

Mechem, 253, 258; Bishop Con. 1055; Story, 481, 487; Matthiessen v. McMahon, 38 N. J. L. 536; Drew v. Nunn, 4 Q. B. D. 661; Hill v. Day, 34 N. J. Eq. 150; Salisbury v. Brisbane, 61 N. Y. 617.

3

BANKRUPTCY OF PRINCIPAL OR AGENT.

The bankruptcy of either principal or agent terminates the agency.

PARKER v. SMITH.

Court of King's Bench, 1812.

16 East, 382.

LORD ELLENBOROUGH, C. J., delivered the judgment of the Court.

It appears by the case, that the bankrupt, Samuel Parker, as an underwriter, and the defendant as brokers, had been in a course of dealing together in the year 1808, 1809, and up to

the period of Samuel Parker's bankruptcy, on the 27th of August, 1810. That in the course of those dealings, at the time of adjusting their last balance, which was up to 31st December, 1809, Samuel Parker, the underwriter, allowed the broker to deduct from money otherwise payable to him for premiums, what was due to the assured on various policies effected and held by them as brokers, for returns of premium, *for convoys and short interest, and otherwise*, as the case states it; in effect, to deduct, as we must understand it, all that was claimable from the underwriter on account of the assured. As there was in this case no *del credere* commission paid to the brokers, the dealings with them must be considered as dealings with them merely in the character of *agents* for the assured, and not as dealings virtually had with the assured themselves; on which special ground, in respect to the commission *del credere* in that case, *Grove v. Dubois*, 1 Term. Rep. 112, was determined. In their character of agents, the defendants' authority as to acts done, that is to say, payments in fact made, and transactions actually executed and consummated, cannot be questioned. The underwriter and his assignees are precluded by the adjustments which took place, from contending that the brokers were not then well entitled to deduct and retain, what on the behalf of the assured they in fact then deducted and retained, in account with the underwriter for losses, short interest, and returns of premiums; but still more deductions were made, and acts done, under a determinable authority, as to all subsequent concerns; and inasmuch as a bankruptcy on the part of the underwriter has, in fact, taken place, the question is, whether that authority to settle on his behalf, to apply his premium in hand to the satisfaction of demands justly claimable against him by the assured, and which, up to that time subsisted, is not in point of law countermanded? And inasmuch as the bankrupt was not competent after his bankruptcy to pay or apply this fund himself in satisfaction of these claims of the assured, it follows as a consequence, that he could not authorize his broker so to do; otherwise the derivative and implied authority would be stronger and more extensive than

the original and principal authority of the party himself, which cannot be. The consequence is, that the authority of the agent, the brokers, was virtually countermanded and extinct by that act of bankruptcy, by which the bankrupt's own original power over the subject-matter ceased and became transferred to others. In conformity, therefore, with what was decided by the Court of Common Pleas, in *Minett and Another, Assignees of Barchard v. Forrester*, which proceeded expressly on this ground, that the authority given by the bankrupt ceased by his bankruptcy, we are of opinion that the plaintiffs are entitled to recover all the three sums demanded by this action; the same not being retained by virtue of any antecedent adjustment by the bankrupt, nor of any authority from him, express or implied, extending to payments or adjustments to be made subsequent to his bankruptcy. How far these sums could have been recovered from the brokers, if the bankruptcy had not happened, it is unnecessary for us to consider or decide upon the present occasion.

Judgment for the plaintiffs.

Mechem, 263, 267; *Story*, 482; *Minett v. Forrester*, 4 Taunt. 541; *Bishop Con.* 1056; *Rowe v. Rand*, 111 Ind. 206.

Bankruptcy of Agent.—Where the agent's solvency is essential to the agency, as where he is authorized to receive money for the principal, his bankruptcy will terminate the agency: *Audenried v. Betteley*, 8 Allen, 302; *Hudson v. Granger*, 5 B. & Ald. 27 (7 Eng. Com. Law, 10).

War.—War being declared between the countries of the principal and agent, the agency is dissolved: *Montgomery v. U. S.*, 15 Wall. 395; *Insurance Co. v. Davis*, 95 U. S. 425.

